Supreme Court, U.S.
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In The

Supreme Court of the United States

EIE GUAM CORPORATION,

Petitioner

v.

THE LONG-TERM CREDIT BANK OF JAPAN, LTD., and THE RESOLUTION AND COLLECTION CORPORATION

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (FSIA) grants federal courts subject matter jurisdiction over actions against a "foreign state," 28 U.S.C. § 1330, a term defined to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). An "agency or instrumentality of a foreign state" is defined by the FSIA as, *inter alia*, any entity "(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b). Federal law also authorizes a foreign state to remove to federal district court "any civil action brought in a State court against a foreign state." 28 U.S.C. § 1441(d).

The questions presented are:

1. May a private business corporation, the majority of whose shares or "other ownership interest" is not owned by a foreign state, qualify as "an agency or instrumentality of a foreign state" on the ground that it is an "organ of a foreign state" despite this Court's contrary interpretation of Section 1603(b) in *Dole Food Co. v. Patrickson*, 538 U.S. ___, 123 S. Ct. 1655 (2003), and the intent of Congress?

2. Contrary to *Cable v. Ellis*, 110 U.S. 389 (1884), its progeny and the intent of Congress, may Section 1441(d) be read to authorize an "agency or instrumentality of a foreign state" that voluntarily joined a suit brought originally against a private party to remove the suit to a federal district court?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parent of EIE Guam Corporation is International Trading Network Ltd., a corporation organized under the laws of Guam.

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Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Relations of the House Comm. on the Judiciary, 93d Cong. (1973) 19

OTHER AUTHORITIES

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Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, *reprinted in* F.V. García-Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974) 17

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Restatement (Second) of Foreign Relations Law of the United States (1965) 19, 20

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PETITION FOR A WRIT OF CERTIORARI

EIE Guam Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit on jurisdiction (App., *infra*, 1a-28a) is reported at 322 F.3d 635. A separate memorandum opinion of the Ninth Circuit on the merits (*id.* at 29a-31a) is unreported. The relevant opinions of the district court denying remand of the case to Guam Superior Court (*id.* at 32a-54a), denying certification of that order for immediate appeal under 28 U.S.C. § 1292(b) (*id.* at 55a-60a), regarding the empanelling of a jury (*id.* at 61a-71a), and determining that Guam law applies to all substantive claims (*id.* at 72a-78a) are unreported.

JURISDICTION

The Ninth Circuit entered its judgment on February 27, 2003. A petition for rehearing was denied on May 29, 2003. App., *infra*, 79a-80a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, are set forth at App., *infra*, 81a-99a, and the relevant text of 28 U.S.C. § 1441 is set forth at App., *infra*, 100a-101a.

STATEMENT

A. Statutory Framework

The Foreign Sovereign Immunities Act of 1976 (FSIA) was enacted to provide a comprehensive statutory framework for determining "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States." H.R. Rep. No. 94-1487, at 6 (1976). Plaintiffs may bring suits against foreign states in both state and federal court, but the FSIA allows foreign states to remove to federal court "any civil action brought in State court against [the] foreign state." 28 U.S.C. § 1441(d). In addition, suits against foreign states in federal court are tried by a judge, not a jury. *See id.* §§ 1330, 1441(d). The FSIA also prescribes the standards for determining when a foreign state may assert immunity from suit so that the case may be dismissed, *see id.* § 1604 (general rule), § 1605 (exceptions), as well as immunity from attachment and execution of property to enforce valid judgments, *see id.* § 1609 (general rule), § 1610 (exceptions), § 1611 (additional exceptions).

Whether the procedural and immunity provisions of the FSIA apply in a particular case depends on meeting the definition of a "foreign state." The FSIA defines a "foreign state" to include a "political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). An "agency or instrumentality of a foreign state" is defined to mean any entity

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

Id. § 1603(b)(1)-(3).

In *Dole Food Co. v. Patrickson*, 538 U.S. __, 123 S. Ct. 1655 (2003), the Court confirmed Section 1603(b)(2)'s requirement that an entity that is owned through shares or other ownership interests must be "owned by a foreign state or political subdivision thereof" in order for that entity to constitute an "agency or instrumentality" for purposes of the FSIA. The Court held that a "corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares." 123 S. Ct. at 1662. If a corporation is owned by another corporation, the subsidiary corporation is not "owned" by a foreign state, and thus is not an "agency or instrumentality," even if the parent corporation is wholly-owned by a foreign state. *Ibid.*

B. Factual and Procedural Background

Petitioner EIE Guam Corporation (EIE Guam), a private business, brought this civil action in the Superior Court of Guam against a private bank, the Long-Term Credit Bank of Japan (the Bank).[1] The suit arose from a commercial dispute about security instruments encumbering a private hotel. After more than four years of active litigation, the Bank assigned its interests in the litigation to the Resolution and Collection Corporation (RC Corporation), an ordinary private business corporation organized

[1] On June 5, 2000, the Bank changed its name to Shinsei Bank, Ltd.

under the laws of Japan. RC Corporation voluntarily joined the action and, claiming that it was an "agency or instrumentality of a foreign state" and that the suit was "brought * * * against a foreign state," invoked 28 U.S.C. § 1441(d) to remove the case to the District Court of Guam. The district court declined to remand the case back to the Guam Superior Court, and the Ninth Circuit affirmed.

1. Petitioner EIE Guam, a private corporation organized under the laws of Guam, was formed to construct and later to operate a Hyatt hotel in Guam. App., *infra*, 2a-3a, 32a-33a. In July 1992, the Bank, a private corporation organized under the laws of Japan, and other lending institutions encumbered the hotel with numerous debt instruments, under which the Bank could seek to foreclose on the hotel. *Id.* at 3a, 33a.

In 1995, EIE Guam brought the instant suit in Guam Superior Court against the Bank and the other lending institutions alleging, *inter alia*, that they had imposed the debt instruments on EIE Guam and its hotel through self-dealing, in breach of their fiduciary duties and without consideration in violation of Guam law. *Id.* at 33a. The complaint sought to invalidate or reform the agreements, to enjoin foreclosure of the hotel and asked for an award of actual and punitive damages. *Ibid.* The Bank filed an answer denying the allegations and asserting counterclaims against EIE Guam under Guam law. *Ibid.*[2] The other lending institutions sued by EIE Guam were voluntarily dismissed in May 1996. *Id.* at 3a. The remaining parties engaged in more than four years of active litigation, including "68

[2] The Bank also brought a third-party complaint against EIE Guam's then-parent, EIE International Corporation. App., *infra*, 33a. In 2002, the parties stipulated to the dismissal of that third-party complaint.

motions, over 28 depositions taken in Guam, Tokyo, Osaka, Sapporo, Los Angeles, and New York, and approximately 300,000 pages of documents produced by the parties." *Id.* at 33a. After twice scheduling and then vacating a trial date for the case, the Guam Superior Court set a firm trial date for September 2000 and scheduled oral argument on EIE Guam's motion for partial summary judgment for March 3, 2000. *Id.* at 33a-34a.

2. In August 1999, during the course of the litigation, the Bank voluntarily assigned its notes, security interests, and claims that were the subject of the lawsuit to RC Corporation. App., *infra*, 3a. RC Corporation is a private company incorporated under the laws of Japan whose general purpose is to purchase, collect, administer and sell non-performing loans of failing financial institutions. *Id.* at 8a. RC Corporation is wholly owned by the Deposit Insurance Corporation of Japan (DICJ), which is partially owned by the Japanese government. *Id.* at 7a n.3; C.A. S.E.R. 191.

In January 2000, the Bank moved to join RC Corporation as a defendant and counterclaimant in the litigation under Guam Rule of Civil Procedure 25(c), a rule identical to Federal Rule of Civil Procedure 25(c). App., *infra*, 3a. In arguing for joinder, the Bank and RC Corporation represented that joinder would "not affect the substantive rights of the parties" nor "deprive the Court of the power to manage its own schedule." C.A. E.R. 830-831. They also represented that joinder "under Rule 25(c) is not designed to create new relationships among the parties to a suit but is designed to allow the [original] action to continue unabated when an interest in the lawsuit changes hands." C.A. E.R. 831. The Bank, RC Corporation, and EIE Guam then submitted a stipulation that RC Corporation be permitted to join the action. App., *infra*, 3a, 34a. The Guam Superior Court entered an order in accordance with the stipulation on March 2, 2000. *Id.* at 34a. The next day, RC Corporation filed

a notice of removal in the District Court of Guam claiming to be an "agency or instrumentality" of a foreign state and invoking the FSIA's removal provision, 28 U.S.C. § 1441(d). App., *infra*, 3a, 42a-46a. The Bank did not make such a claim nor had it ever attempted to remove the case.

3. The district court denied EIE Guam's motion to remand. App., *infra*, 32a-54a. The district court held: (1) that RC Corporation was a "foreign state," reasoning that, despite being an entity created in corporate form that was not owned by the Japanese government and thus not "owned by a foreign state" under Section 1603(b)(2), RC Corporation qualified as an "organ" of Japan under Section 1603(b)(2) and thus as an "agency or instrumentality of a foreign state" under the FSIA (App., *infra*, 37a-46a); and (2) that RC Corporation could remove the action under Section 1441(d) even though it had obtained its interest in the property involved in the litigation during the pendency of the litigation and voluntarily joined the action. App., *infra*, 46a-49a. That court later denied EIE Guam's motion to certify the question for immediate appeal pursuant to 28 U.S.C. § 1292(b). App., *infra*, 55a-60a.

In pretrial rulings, the district court held that the FSIA prohibits a trial by jury of certain claims at law that the court viewed as being claims by EIE Guam against RC Corporation. *Id.* at 72a-77a. The court acknowledged that its ruling could lead to the court's making its own factual determinations contrary to those of the jury that will be empanelled to hear, in parallel, the claims of EIE Guam against the Bank, and the claims of the Bank and RC Corporation against EIE Guam. *Id.* at 61a-71a.

The parties subsequently entered into a settlement agreement. *Id.* at 4a. After the terms of the settlement agreement were breached, the Bank and RC Corporation asked the district court to set the case for trial and EIE

Guam sought specific performance of the settlement agreement. *Ibid.* In May 2002, the district court ordered the parties to comply with a modified version of the settlement agreement, leading all the parties to appeal. *Id.* at 4a-5a.

4. The Ninth Circuit sustained RC Corporation's removal of the case from Guam Superior Court to the District Court of Guam. App., *infra*, 1a-28a. It acknowledged that RC Corporation did not meet the majority-ownership requirement of Section 1603(b) for corporations to constitute an "agency or instrumentality" because RC Corporation is owned only by DICJ. App., *infra*, 7a n.3. Japan does not own any shares or other ownership interest in RC Corporation. *Ibid.* Nonetheless, the court held, relying on previous circuit law, that a corporation owned by an entity other than a foreign state could still be deemed an "agency or instrumentality" as an "organ of a foreign state," so long as the corporation "engages in a public activity on behalf of the foreign government." *Id.* at 7a-8a. To make this determination, the Ninth Circuit created a complex balancing test, weighing:

> the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law.

Id. at 8a.

Applying this multi-factor analysis, the Ninth Circuit concluded that RC Corporation was an "organ" of the government of Japan and "therefore, an 'instrumentality' covered by the FSIA." *Id.* at 9a. It relied on the district court's conclusions that RC Corporation was created to perform a public function, that one of its primary functions is to purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions, that some of RC Corporation's activities are performed

exclusively by it, that it is funded in part by the Japanese government and that under Japanese law any losses incurred by RC Corporation would ultimately be borne by the Japanese government. *Id.* at 8a-9a.

The Ninth Circuit further held that the lawsuit was a "civil action brought in a State court against a foreign state" for purposes of the removal statute, 28 U.S.C. § 1441(d). App., *infra*, 12a-15a. It rejected petitioner's argument that removal by an assignee that voluntarily joins the litigation is precluded by this Court's longstanding precedent. *Id.* at 15a-27a.

In a separate unpublished order, the Ninth Circuit concluded without stated reasons that the settlement agreement had been breached and thus was a nullity, and remanded the case with instructions to proceed to trial. *Id.* at 29a-31a.

5. EIE Guam filed a petition for rehearing and rehearing *en banc*. While that petition was pending and after respondents had filed an opposition, the Court issued its opinion in *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655, addressing the meaning of the term "agency or instrumentality" in the FSIA. EIE Guam notified the Ninth Circuit of the *Patrickson* decision through a supplemental brief. The panel denied rehearing without any reference to *Patrickson*, with one judge noting that he would have granted rehearing. App., *infra*, 79a-80a.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S RECENT DECISION IN *DOLE FOOD CO. V. PATRICKSON*, PERMITS EVASION OF THAT DECISION, AND UNDULY EXPANDS FEDERAL COURT JURISDICTION

The Ninth Circuit erroneously determined that a corporation owned by an entity other than a foreign state can be deemed an "organ of a foreign state" and, hence, an "agency or instrumentality" under the Foreign Sovereign Immunities Act (FSIA) entitled, *inter alia*, to remove actions brought against it in state court under 28 U.S.C. § 1441(d), and to claim the immunity presumptively granted foreign sovereigns under 28 U.S.C. § 1604. The Ninth Circuit first reached that result eight years earlier with little analysis. *See Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460-1461 (9th Cir. 1995). Evidencing the obvious problems of deeming a privately owned corporation to be equivalent to a foreign sovereign, the Ninth Circuit has had to use a tortuous multi-factor balancing inquiry to determine which private corporations should be deemed to hold this status. *See, e.g., EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Corp.*, 257 F.3d 992, 997-999 (9th Cir. 2001); *Patrickson v. Dole Food Co.*, 251 F.3d 795, 806-808 (9th Cir. 2001), *aff'd on other grounds*, 538 U.S. __, 123 S. Ct. 1655 (2003); *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1084-1085 (9th Cir. 1999), *op. withdrawn per stipulation*, 237 F.3d 1007 (9th Cir. 2001); *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654-655 (9th Cir. 1996).

The Ninth Circuit failed to recognize that entities created in corporate form cannot qualify as an "organ of a foreign state" under the FSIA. The sovereign character of a

corporation is determined by its ownership, as set forth in the FSIA. The text and structure of the definition of "agency or instrumentality of a foreign state" in the FSIA, as interpreted by this Court in *Dole Food Co. v. Patrickson*, 538 U.S. __, 123 S. Ct. 1655 (2003), make clear that Congress did not intend corporations to be eligible for "organ" status. This is particularly so in light of a common international understanding of the term "organ of a foreign state" at the time of the FSIA's enactment, which is reinforced by the relevant legislative history of the FSIA.

This Court's *Patrickson* opinion was not available to the court of appeals panel when it issued its opinion or when petitioner filed its petition for rehearing. Petitioner filed a supplemental reply brief to its rehearing petition discussing *Patrickson*. In such circumstances, this Court has found it appropriate to give the court of appeals an opportunity to engage in plenary consideration of the matter. *See Lawrence v. Chater*, 516 U.S. 163, 170 (1996) (order granting certiorari, vacating, and remanding is appropriate when new Supreme Court decision is implicated, and "where the lower court's order shows no sign of having applied the precedents that were briefed"). Whatever mechanism the Court selects, the opinion below should not be allowed to stand.

A. The Ninth Circuit's Allowing A Private Corporation Not Majority-Owned By A Foreign State To Invoke Protections Accorded Foreign States Contradicts This Court's Intervening Decision In *Patrickson* And Permits Evasion Of That Ruling

1. Plenary review by this Court is warranted because the Ninth Circuit's reasoning is at odds with the holding of *Patrickson*, 123 S. Ct. 1655, in which the Court recently reviewed the text and structure of the FSIA in

interpreting the FSIA's definition of "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b). That definition of "agency or instrumentality" anticipated that some, but not all, agencies and instrumentalities of foreign states would take corporate form. *See id.* § 1603(b)(1) (requiring that entity be a separate legal person "corporate or otherwise"). The FSIA prescribes that a corporation constitutes an agency or instrumentality of a foreign state when a majority of its "shares" (or other ownership interest, if the corporation has no shares) is owned by the foreign state itself, and not through any intermediary. *See id.* § 1603(b)(2); *Patrickson*, 123 S. Ct. at 1660-1661. RC Corporation does not meet this requirement. None of its shares is owned by a foreign state. App., *infra*, 7a n.3.

Allowing entities created in corporate form to be deemed organs is inconsistent with *Patrickson*'s holding that the FSIA respects the selection of the corporate form. "It is evident from the Act's text that Congress was aware of settled principles of corporate law and legislated within that context. The language of § 1603(b)(2) refers to ownership of 'shares,' showing that Congress intended statutory coverage to turn on formal corporate ownership." *Patrickson*, 123 S. Ct. at 1660. The Court recognized that Congress "had corporate formalities in mind" and the FSIA gave "no indication that Congress intended [courts] to depart from the general rules regarding corporate formalities." *Id.* at 1660, 1661. When an entity is created in corporate form, the only means for determining whether it is an agency or instrumentality is through the ownership test.

The structure of the FSIA indicates that recourse to the "organ of a foreign state" provision of the statute is not available if an entity is created in corporate form. In *Patrickson*, the Court refused to allow a corporation to rely on the phrase "or other ownership interest" in Section 1603(b)(2) in an attempt to circumvent the majority-shares

requirement articulated in the same phrase of the provision. The Court explained that the "words 'other ownership interest,' when following the word 'shares,' should be interpreted to refer to a type of interest *other* than ownership of stock." 123 S. Ct. at 1661 (emphasis added). Just as Section 1603(b)(2) was read by the Court to preclude an entity that had shares to rely on alternative means of proving majority ownership, the same subsection should be read to preclude an entity that is "owned" to rely on alternative means of proving its status as an agency or instrumentality. By providing that an entity would qualify as an agency or instrumentality if it is an "organ of a foreign state or * * * owned by a foreign state," Congress likewise intended the term "organ" to refer to a type of entity *other* than those entities (such as corporations) that can be owned by a foreign state.

Reading the FSIA to exclude from foreign state treatment corporations that are majority-owned by an entity other than a foreign state is consistent with international law. The majority-ownership rule embodied in the FSIA already provides "somewhat broader" protection to corporations owned by a foreign state than is generally recognized by other foreign states, Gary B. Born & David Westin, *International Civil Litigation in United States Courts* 459 (2d ed. 1992), because other countries do not provide immunity to any foreign corporations based solely on ownership, even when the corporation is wholly owned by a foreign state. *See* William C. Hoffman, *The Separate Entity Rule In International Perspective*, 65 Tulane L. Rev. 535, 565 (1990). The protection in the FSIA for corporations that are majority-owned by a foreign state is thus already over-inclusive in comparison to that available under international norms. Having provided a prophylactic rule for determining the agency or instrumentality status of corporate entities, Congress could not have

intended to provide even further protections for entities created as corporations by use of the term "organ of a foreign state," a term often understood in the international context not to include such entities. *See* pages 16-17, *infra*.

Congress did not intend to abandon that easy-to-apply majority-ownership requirement in exchange for the fact-intensive inquiry (with its attendant discovery burdens) that the Ninth Circuit has created. *See* Gabe Shawn Varges, *Defining a Sovereign for Immunity Purposes*, 26 Harv. Int'l L. J. 103, 144 (1985) ("The ownership test has proven to be a generally reliable and objective standard for ascertaining whether the sovereign's interests are at stake."). *Patrickson* held that the FSIA should not be read to support a test "that mandates inquiry in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares." 123 S. Ct. at 1662. Although that statement was made in the context of determining whether a corporation is "owned" by a foreign state, the same reasoning establishes that Congress did not intend for courts to engage in such an inquiry to determine whether a corporation is an "organ."

2. The procedural protections of the FSIA give foreign corporations strong incentives to have themselves classified as agencies or instrumentalities of foreign states. It is therefore likely that the "organ of a foreign state" classification will now be pressed into service by many foreign corporations that, after *Patrickson*, are no longer eligible under the majority-ownership provision. That attempt to evade the import of *Patrickson* will place great pressure on the lower courts to expand federal jurisdiction. That is precisely what has happened in the Ninth Circuit. Presaging this Court's holding in *Patrickson*, the Ninth Circuit in 1995 held that a corporation that

is a subsidiary of another corporation cannot itself meet the majority-ownership test of the FSIA even if its parent is majority-owned by a foreign state. *See Gates*, 54 F.3d at 1461-1462. That ruling has led subsidiary corporations in the Ninth Circuit to consistently argue that they are "organs" of a foreign state. *See* page 9, *supra*. Absent directions from this Court that the term "organ" does not apply to corporations, the reliance on this provision of the FSIA by corporations will multiply, as will the uncertainty and inconsistency among the lower courts relying upon the multi-factor balancing inquiry (or some other inquiry equally untethered to the statute's text). *See* pages 21-23, *infra*.

The result in this case reflects the relatively negligible showing that a corporation needs to make in the Ninth Circuit to constitute an "organ" under that court's wide-ranging inquiry. A corporation such as respondent RC Corporation that buys loans from banks for resale to other banks is engaging in a common commercial action that hardly ranks as a uniquely sovereign activity. The balance of the factors in the instant case, including RC Corporation's status as a private (as opposed to governmental) corporation under Japanese law, the facts that its employees are not government employees subject to civil service rules, that its function is replicated by other private entities, and that respondents offered no evidence that RC Corporation was controlled by the Japanese government (*see* App., *infra*, 7a-10a) all weigh against such a status. *Cf. United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97-6124, 1999 U.S. Dist. LEXIS 7236 at *20-22 (S.D.N.Y. May 17, 1999) (holding that corporation in similar situation was not an organ); *Proctor & Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F. Supp. 2d 644, 654-655 (W.D. Tenn. 1998) (same). By holding that the RC

Corporation is nonetheless an organ of a foreign state, the Ninth Circuit has adopted an unworkable balancing inquiry that opens the floodgates for foreign corporations to evade *Patrickson* and seek litigation of state claims in federal courts.

Mischaracterization of a corporation as an agency or instrumentality also burdens a plaintiff's substantial rights. The FSIA deprives a plaintiff of a jury trial against a foreign state or its agency or instrumentality if the case is brought in or removed to federal court, regardless of whether the defendant's conduct is determined to be immune. *See* 28 U.S.C. §§ 1330, 1441(d). Here, the removal from Guam Superior Court to the District Court of Guam (which is contingent on the RC Corporation's status as an organ of a foreign state, App., *infra*, 42a-46a) deprived petitioner of a jury trial to which it was entitled under local law on claims at law that the district court viewed to be against the RC Corporation. *Id.* at 66a-67a; *see* 7 Guam Code Ann. § 22104 ("In all cases at law in which the demand * * * amounts to more than Twenty Dollars ($20.00) * * * the parties shall be entitled to a trial by jury."). The Ninth Circuit's convoluted multi-factor balancing inquiry increases the likelihood that an appellate court will reach a different conclusion from the trial court about whether a particular corporation is an organ, thereby increasing the likelihood of wasting resources of the courts and the parties on a trial before the improper fact-finder.

B. The Ninth Circuit's Reading Of "Organ Of A Foreign State" To Include Corporate Entities Is Inconsistent With The Intent Of Congress

1. The Ninth Circuit erroneously treated the term "organ of a foreign state" as a catch-all category in which

any corporation regardless of ownership – indeed, even a wholly private corporation – that seems, in a court's view, to "engage[ ] in a public activity on behalf of the foreign government" can be deemed an agency or instrumentality of a foreign state and thereby entitled to invoke the protections of the FSIA. App., *infra*, 7a. But "the FSIA was not written on a clean slate." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992). Instead, the meaning of its terms is "the meaning generally attached to [them] * * * at the time the statute was enacted." *Id.* at 612-613. The FSIA was enacted in 1976 to modernize the treatment of foreign states' sovereign immunity in light of international law. In doing so, Congress intended to work within an international law framework. *See* 28 U.S.C. § 1602 (invoking "international law"), § 1604 (FSIA's standards "[s]ubject to existing international agreements"), § 1609 (same); *see also Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994) ("Congress spoke [in the FSIA] against a rich background of federal and international law that colors the statutory terms and fills them out.").

At the time Congress enacted the FSIA, the International Law Commission, established by the United Nations to codify international law, *see United States v. Louisiana*, 394 U.S. 11, 16 n.7 (1969), had issued a comprehensive report analyzing the term "organ of a State." *See Third Report on State Responsibility*, U.N. Doc. A/CN.4/246 & Add. 1-3, *reprinted in* [1971] 2 Y.B. Int'l L. Comm'n (pt. 1) 199, U.N. Doc. A/CN.4/SER.A/1971/Add.1 (Part 1). The *Report* concluded that the term "organ of the State" broadly encompasses "any sector" of "the internal machinery of the State," (*e.g.*, the legislature, the executive, and the judiciary). *Id.* at 238, 244; *see also* Varges, *supra*, at 124 (explaining that in international agreements, the term "organ" covers "such integral arms of the state as cabinets,

ministries, and departments (along with armed forces and other traditionally recognized organic parts of the state)" as well as "entities of lower stature, such as governmental boards or commissions").

The International Law Commission's *Report* made clear, however, that "public corporations and other public institutions which have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions," did not fall within the scope of the term "organ of the State" even though such corporations may engage in "public functions which serve the interests of the community." *Third Report on State Responsibility*, *supra*, at 254. The justification for that distinction was that, "in the context of the internal legal order, we find that each of these institutions has its own machinery, which is not part of the machinery of the State." *Ibid.* That distinction between "organs of the State" and corporations – even government-owned corporations – is consistent with the views a group of prominent American scholars around the same time. *See Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, Arts. 16.1, 17.2, *reprinted in* F.V. García-Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* 249, 253 (1974) (defining an "organ of a State" to include "any legislative, deliberative, executive, administrative, or judicial organ or agency of a State," but expressly providing that the term does not include "any enterprise normally considered as commercial which is owned in whole or in part by a State * * * if such enterprise is * * * a separate juristic person with respect to which the State [does not] accord[ ] immunity in its own courts").

2. Consistent with that international understanding of the term "organ of a foreign state" at the time of the FSIA's enactment, Congress used the term "organ" in the

FSIA to include only entities that, under the law of the foreign state, are treated as "separate legal person[s]" but are not corporations. Early FSIA cases applied the term "organ" to protect precisely those types of entities. *See TIFA, Ltd. v. Republic of Ghana*, No. 88-1513, 1991 U.S. Dist. LEXIS 11855 (D.D.C. Aug. 27, 1991) (Embassy of Ghana); *Mueller v. Diggleman*, No. 82-5513, 1983 U.S. Dist. LEXIS 16970 (S.D.N.Y. May 13, 1983) (Swiss court).

The legislative history makes clear this limited but important role for the term "organ." The House Committee Report states that the statute "requires that the entity be either an organ of a foreign state * * *, or that a majority of the entity's shares or other ownership interest be owned by a foreign state * * *. If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state *only if* a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state." H.R. Rep. No. 94-1487, at 15 (1976) (emphasis added). *Accord Patrickson*, 123 S. Ct. at 1662 ("A corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares."). Only entities not owned by another entity can fall within the scope of the term "organ" under the FSIA.

The Ninth Circuit ignored the history; it focused on another sentence of the House Committee Report, stating that, as a general matter, "entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own

name." App., *infra*, 7a (quoting H.R. Rep. No. 94-1487, at 15-16 (1976)). The Ninth Circuit, citing the "state trading company" and "export association" examples, had earlier concluded that "an entity's involvement in commercial affairs does not automatically render the entity non-governmental." *Gates*, 54 F.3d at 1461. The cited examples provide no basis for the conclusion (followed in this case) that Congress intended for entities created in corporate form to be deemed "organs." The House Committee Report did not suggest that all its examples would be found to be "agencies or instrumentalities of a foreign state" under the "organ" provision. Under the FSIA's definition, the corporate entities listed could be found to be agencies or instrumentalities of a foreign state because they were majority-owned by the foreign state.

The legislative history also shows that Congress and the Executive Branch drew upon the *Restatement (Second) of Foreign Relations Law of the United States* (1965), in crafting the FSIA. *See* H.R. Rep. No. 94-1487, at 23 (1976); *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Relations of the House Comm. on the Judiciary*, 93d Cong. 32 (1973) (testimony of Bruno Ristau, U.S. Department of Justice). Distinguishing between corporations and government agencies is consistent with the views of the *Restatement*. *See Restatement, supra,* § 66(c) & (g) (distinguishing between a "governmental agency" and "corporation[s] created" under a foreign state's laws). In describing the "criteria used in deciding whether a corporation is entitled to the immunity of a state," the *Restatement* explained that (1) it was "essential to a claim of immunity that the corporation be incorporated under the laws of that [foreign] state"; (2) "[t]he fact that the foreign government does not own all of the stock must * * * be given great weight"; and (3) the immunity given the corporation under local law "is a

factor." *Id.* at cmt. c & reporters' note 2. The FSIA expressly incorporates the first two factors articulated by the *Restatement* by addressing state of incorporation and percentage of ownership as requirements for "agency or instrumentality" status. *See* 28 U.S.C. § 1603(b)(3), (b)(2). No basis exists to conclude that Congress used the term "organ" to expand the types of corporations eligible for a foreign state's sovereign immunity beyond that identified by the *Restatement*.

C. The Multi-Factor Balancing Inquiry Adopted By The Ninth Circuit Contravenes Congress's Intent That Jurisdictional Rules Be Interpreted Narrowly And Removes The Predictability That Congress Intended The FSIA To Provide

Even if there were room under the FSIA framework to allow a corporation not majority-owned by a foreign state to be included as an agency or instrumentality of that state, the Ninth Circuit's multi-factor balancing inquiry results in serious adverse consequences that undermine the aims of the FSIA and jurisdictional rules generally.

1. The question whether an entity is an agency or instrumentality of a foreign state is a threshold question in determining federal court jurisdiction under the FSIA. *See* 28 U.S.C. § 1330 (granting original jurisdiction over suits "against a foreign state"), § 1441(d) (authorizing removal of suits brought "against a foreign state"). Provisions granting federal courts subject-matter jurisdiction are to be construed narrowly to restrain federal courts from improperly exercising judicial power over parties or subjects that Congress did not intend. *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1958) (noting the "deeply

felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes"). This Court has also emphasized that threshold jurisdictional inquiries must be based on clear rules, avoiding unnecessary expenditure of resources on preliminary matters. *See Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002); *see also Burnham v. Superior Ct.*, 495 U.S. 604, 626 (1990) (plurality opinion of Scalia, J.).[3]

2. The standard adopted below – that a corporation is an "organ of a foreign state" if it engages in a "public activity on behalf of a foreign state" – creates uncertainty because it is inherently indeterminant. *Cf. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 634 n.27 (1983) (declining to rely on whether a government instrumentality "performed a 'governmental function'" in determining whether to attribute conduct of foreign corporation to foreign state because "the concept of a 'usual' or a 'proper' governmental function changes over time and varies from nation to nation"); *Franchise Tax Bd. v. Hyatt*, 538 U.S. __, 123 S. Ct. 1683, 1689 (2003) (rejecting as "'unsound in principle and unworkable in practice' a

[3] The need for clear legal rules is particularly important in the removal setting. District court determinations that removal is *not* proper are typically not subject to appellate review because generally "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). District court determinations that removal *is* proper are unappealable interlocutory orders that often cannot be reviewed even on appeal from a final judgment. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75-76 (1996) (procedurally improper removal, by itself, is not a ground for reversal of a final judgment). Accepting the Ninth Circuit's balancing inquiry will vest district courts with often unreviewable discretion over whether to deem a corporation that is not majority-owned by a foreign state, nonetheless, to be an "organ" of that foreign state.

rule * * * that turned on whether a particular state government function was 'integral' or 'traditional' ").

The uncertainty is multiplied because, even though the multi-factor balancing inquiry adopted by the Ninth Circuit has been cited by some other courts, they do not necessarily apply the factors in the same manner. The Fifth Circuit, for example, has adopted a multi-factor balancing inquiry for determining "organ" status under the FSIA, but it gives weight to the various factors differently than does the Ninth Circuit. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir.) ("there is no 'clear test' for determining agency or instrumentality status under the . . . 'organ' prong" and thus, although Ninth Circuit "factors provide a helpful framework, we will not apply them mechanically or require that all five support an organ determination"), *cert. denied*, 531 U.S. 979 (2000). Some district courts have likewise adopted multi-factor balancing inquiries, even while acknowledging the indeterminacy of such inquiries.[4] Other courts appear to have adopted alternative inquiries altogether.[5]

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[4] *See, e.g., Glencore, Ltd. v. Chase Manhattan Bank, N.A.*, No. 92 Civ. 6214, 1998 U.S. Dist. LEXIS 1912, at *10-*11 (S.D.N.Y. Feb. 20, 1998) ("The nature of the determination of whether an entity is an organ of a foreign state is fact-intensive, and must be done on a case-by case basis. The five factors listed above form a flexible guideline to help a court determine whether an entity is an organ of a foreign state; the list is not exhaustive, and no one factor is determinative."); *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 378-379 (E.D. Pa. 1997) ("[T]here is no clear test to determine whether an entity qualifies as an 'organ of a foreign state.' ").

[5] *See Dewhurst v. Telenor Invest A.S.*, 83 F. Supp. 2d 577, 595 (D. Md. 2000) (an entity is an "organ" only if the foreign state "exercise[s] sufficient control over the Subsidiary Defendants"); *Proctor & Gamble*, 33 F. Supp. 2d at 654 ("the court finds 'organ' can loosely be defined as an entity that

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But Congress did not intend the terms of the FSIA to promote such conflict and uncertainty. A central aim of the statute was to promote "uniformity in decision" by eliminating *ad hoc* decisionmaking and articulating clear standards regarding questions of foreign sovereign immunity. H.R. Rep. No. 94-1487, at 8, 13 (1976). Guidance from this Court is needed to create certainty in the commercial arena and to avoid the waste of judicial and litigation resources.

3. The Ninth Circuit's multi-factor balancing inquiry has extended the protections of the FSIA to foreign corporations that are not owned by foreign states and whose entitlement to such protections would be difficult to predict. Even the most sophisticated commercial entities, including American corporations, would not be on notice that a corporation with which they do business will later have a colorable claim to be an "organ," and thus potentially immune from suit and execution of judgment. Yet the FSIA envisions just the opposite – that commercial entities will be on notice. The FSIA encourages market participants to take steps to reduce such a risk by expressly allowing them, for example, to attempt to obtain waivers of immunity from suit and attachment. *See* 28 U.S.C. §§ 1605(a)(1), 1610(b)(1), 1611(b)(1).

Certiorari should be granted because the Ninth Circuit's holding is contrary to the text and structure of the FSIA, contrary to the rationale of *Patrickson*, and undermines the development of the "uniform body of law in this area," H.R. Rep. No. 94-1487, at 32 (1976), that the FSIA was intended to promote.

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either performs a government function or which is ultimately controlled by the state").

II. THE NINTH CIRCUIT'S RULING THAT ALLOWS REMOVAL BY AN ENTITY THAT VOLUNTARILY JOINED A SUIT BETWEEN PRIVATE PARTIES IS CONTRARY TO LONGSTANDING PRECEDENTS OF THIS COURT

A. The Ninth Circuit's Ruling Is Contrary To Supreme Court Precedents

1. In interpreting the federal removal statutes, it has been well-established by this Court for more than one hundred years that a party that voluntarily intervenes or joins a pending state court action cannot remove the case to federal court unless the case could have been removed to federal court in that party's absence. The Court first addressed the issue in *Cable v. Ellis*, 110 U.S. 389 (1884), which involved a suit that was initially between parties from the same State. The Court held that a party's sale of the property that was the subject of the litigation to an out-of-state individual during the pendency of litigation (*pendente lite*) did not allow the new out-of-state owner, who intervened in the litigation, to remove the case to federal court under the statutory predecessor to 28 U.S.C. § 1441(a), even though the intervention caused the citizenship of the parties to be diverse. *See Cable*, 110 U.S. at 398.

The Court has thereafter explained that *Cable* held that the statutory right to remove is judged by the identity of the defendant against whom the plaintiff brought suit (so long as plaintiff did not omit any then-necessary party), not by any subsequent events caused by defendants and that, "[b]y purchasing [the property] *pendente lite*," the new owner "connected himself with the suit, subject to the disabilities of the other parties in respect to a removal at the time he came in." *Jefferson v. Driver*, 117 U.S. 272, 274-275 (1886); *accord Houston & Texas Cent. Ry. Co. v. Shirley*, 111 U.S. 358, 361 (1884) ("a substituted party comes into a suit

subject to all the disabilities of him whose place he takes, so far as the right of removal is concerned").

The Ninth Circuit refused to apply this settled interpretation to Section 1441(d), contrary to three distinct lines of decisions of this Court.

a. The decision below is contrary to *Cable* and *Jefferson*. The Ninth Circuit refused to follow *Cable* and *Jefferson* because they are old. App., *infra*, 21a ("[t]hese cases were decided almost a hundred years before the enactment of the FSIA"). Opinions by this Court bind the lower courts until expressly overruled by this Court. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam); *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

b. The decision below is irreconcilable with *Patrickson*. The Ninth Circuit held that cases concerning removal based upon diversity jurisdiction are irrelevant because "the legislative history show[ed] that Congress rejected the diversity paradigm for foreign states when it passed the FSIA." App., *infra*, 22a. That rationale, even if plausible before *Patrickson* (which it was not), cannot survive *Patrickson*. In *Patrickson*, the Court held that agency or instrumentality status must be determined at the time the suit is filed, not at the time the violation is alleged to have occurred. 123 S. Ct. at 1662-1663. In reaching this conclusion, the Court drew on "longstanding principle[s]" in its cases interpreting the diversity statute. *Id.* at 1662 ("It is well settled, for example, that federal diversity jurisdiction depends on the citizenship of the parties at the time suit is filed.").

c. The decision below is in conflict with the Court's general presumption against removal, reaffirmed only last Term in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002). If the text of the removal statute were ambiguous, as the Ninth Circuit concluded (App., *infra*, 18a), then

the court was obliged to construe the provision narrowly, not expand it based on non-textual grounds. *See Syngenta*, 537 U.S. at 369-370 (holding that "statutory procedures for removal are to be strictly construed" and citing *Healy v. Ratta*, 292 U.S. 263, 270 (1934), for the proposition that "[d]ue regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined").

2. Interpreting the FSIA to permit removal based on the actions of a party that voluntarily joins the litigation is wrong. The text and structure of the removal statute reflect Congress's intent to apply the general rules governing removal to the FSIA's removal provision. In enacting the FSIA, Congress deliberately placed the FSIA removal provision in Section 1441 of Title 28 of the United States Code, where the general removal provision is codified. *See* Pub. L. No. 94-583, § 6, 90 Stat. 2891, 2898 (1976). Congress thereby indicated its intent that the FSIA removal provision be read in light of the general rules governing removal. By using language in Section 1441(d) that is parallel to the language used in Section 1441(a) ("any civil action brought in a State court [of which the district courts of the United States have original jurisdiction/against a foreign state] may be removed by [the defendant or the defendants/the foreign state] to the district court of the United States for the district and division embracing the place where such action is pending"), Congress could not have more plainly evidenced its intent that subsections (a) and (d) of Section 1441 be read *in pari materia*.

The court below misread the FSIA's legislative history. Nothing in that history suggests an intent to abrogate the settled removal rule governing voluntary joinder. The legislative history reflects Congress's expectations that foreign states removing under Section 1441(d) would be

entitled to more lenient removal conditions in certain identified respects (*i.e.*, a different time limit for removing a case, and the ability to remove without the consent of the other defendants) than those that had traditionally been imposed on defendants removing under Section 1441(a). App., *infra*, 18a-19a (citing H.R. Rep. No. 94-1487, at 32 (1976)). Congress codified those deviations from the general rules in the text of the statute. *See* 28 U.S.C. § 1441(d) ("Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown."); *ibid.* (permitting a "foreign state" against which suit is brought to remove, in contrast to language "defendant or defendants" in Section 1441(a)). The absence of any language in the text that negates the general rule that defendants who voluntarily join the litigation cannot remove if the original defendants cannot remove is particularly telling.[6] Congress's intent that the status of the entity as an agency or instrumentality of a foreign state should be judged "at the time of the filing of the complaint," *Patrickson*, 123 S. Ct. at 1663, confirms that it is the plaintiff's complaint, and not subsequent conduct of other parties, that is relevant to the court's jurisdiction.

Congress did not intend the FSIA to expand federal court jurisdiction to encompass all suits in which a foreign

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[6] Congress has expressly altered the settled removal rule in at least two other removal statutes by providing that certain federal entities may remove a case to federal court regardless of whether the suit was "against" the entity or whether the entity was a "defendant," and with specific reference to removal by the entity when it substitutes itself for one of the existing parties, *see* 12 U.S.C. § 1441a(1)(3)(A) (Resolution Trust Corporation), 12 U.S.C. § 1819(b)(2)(B) (Federal Deposit Insurance Corporation), thus demonstrating that when Congress intends an exception from the rule, it so provides.

state is merely involved in some capacity. Instead of granting federal courts exclusive jurisdiction over suits involving foreign states, the FSIA "clearly contemplates that such suits may be brought in either federal or state courts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). The FSIA does not guarantee a foreign state access to a federal forum – only foreign states that have an action brought "against" them are entitled to invoke federal jurisdiction under the FSIA. 28 U.S.C. §§ 1330, 1441(d). When foreign states are plaintiffs, the FSIA is inapplicable and foreign states may obtain jurisdiction only in the same situations as private entities. *See, e.g.*, 28 U.S.C. § 1332(a)(4) (diversity jurisdiction for foreign states as plaintiffs). These provisions reflect an overarching intent that it is only when a foreign state is haled involuntarily into a court of the United States that it is entitled to any special access to a federal forum.[7]

This suit was not "brought in State court against" RC Corporation, as required by the plain text of the removal statute. 28 U.S.C. § 1441(d). RC Corporation was not brought into this case by petitioner – nor was it a necessary or indispensable party to the litigation. It voluntarily joined the litigation. RC Corporation has used its status as a party solely to litigate (through its counterclaims) its affirmative monetary claims against petitioner that it could have protected through other means. Its voluntary joinder cannot be a basis for removal.[8] The Second Circuit, considering a

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[7] This case does not involve a foreign state that was involuntarily haled into court. The lower court cases relied upon by the Ninth Circuit involving foreign states brought in as third-party defendants (App., *infra*, 17a) are inapposite.

[8] Consistent with RC Corporation's own representations that its joinder would allow the action in local Guam court to continue "unabated,"

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similar question regarding the voluntary participation of a foreign state in a commercial transaction that ended up in federal court, correctly noted that the FSIA does "not insulate [a foreign state] from liabilities it voluntarily assumes." *Matthews v. CTI Container Transp. Int'l*, 871 F.2d 270, 281 (2d Cir. 1988).

B. Allowing A Party That Voluntarily Joined Litigation To Remove The Case To Federal Court Creates Serious Problems Of Forum Shopping And Disruption

Permitting a foreign state or its purported agencies or instrumentalities to join pending state court litigation voluntarily and then remove the lawsuit involving local and state law to federal court can seriously disrupt pending litigation and cause inordinate delay. Prior to the removal in this case, the parties had engaged in more than four years of active litigation. *See* App., *infra*, 33a, 59a. The Guam Superior Court had set a firm trial date for September 2000. *Id.* at 33a-34a. It was on the day that the parties were to be heard on petitioner's motion for partial summary judgment (March 3, 2000) that RC Corporation removed the case to federal court. *Id.* at 34a. The removal precipitated additional years of delay.

Permitting parties who accept assignment of some portion of an asset involved in pending litigation in state

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see page 5, *supra*, this Court has held that joinder under Federal Rule of Civil Procedure 25(c) does not affect subject matter jurisdiction. *See Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428-429 (1991) (per curiam) (holding that joinder of additional party under Fed. R. Civ. P. 25(c) cannot destroy federal diversity jurisdiction once it is established).

court voluntarily to join the litigation and remove the case to federal court increases the ability of defendants to engage in forum shopping. Under the Ninth Circuit's rule, private corporations sued in state courts need only assign some fraction of their interests to a foreign state and then have that foreign state join the case and remove the action to federal court. A rule that permits such an easy manipulation of jurisdiction cannot be tolerated, just as it has not been tolerated with regard to diversity jurisdiction for more than one hundred years.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted. In the alternative, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further consideration in light of this Court's decision in *Dole Food Co. v. Patrickson,* 538 U.S. __, 123 S. Ct. 1655 (2003).

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EIE GUAM CORPORATION, a Guam corporation,

Plaintiff-Appellant,

v.

THE LONG TERM CREDIT BANK OF JAPAN, LTD., now known as THE SHINSEI BANK, LTD., a Japanese corporation; and THE RESOLUTION AND COLLECTION CORPORATION, a Japanese corporation,

Defendants-Appellees

No. 02-16214

D.C. No. CV-00-00009-ER

EIE GUAM CORPORATION, a Guam corporation,

Plaintiff-Appellee,

v.

THE LONG TERM CREDIT BANK OF JAPAN, LTD., now known as THE SHINSEI BANK, LTD., a Japanese corporation; and THE RESOLUTION AND COLLECTION CORPORATION, a Japanese corporation,

Defendants-Appellants.

No. 02-16259

D.C. No. CV-00-00009-ER

OPINION

Appeals from the District Court of Guam
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
January 13, 2003 – San Francisco, California

Filed February 27, 2003

Before: Procter Hug, Jr., Arthur L. Alarcón, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

COUNSEL

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OPINION

GRABER, Circuit Judge:

We are called on to decide whether a voluntarily joined foreign sovereign may remove a case from a territorial court to a federal district court when the foreign sovereign obtained the original defendant's interest by assignment after the commencement of the litigation. We answer that question "yes" and, accordingly, affirm the district court's exercise of jurisdiction over this case.

FACTUAL AND PROCEDURAL HISTORY

EIE Guam Corporation ("EIEG") is a Guam corporation that is a wholly owned subsidiary of a Japanese corporation, EIE International, Inc. In July of 1992, EIEG

obtained a loan of $110.3 million from the Long Term Credit Bank of Japan("Bank") for the construction of the Hyatt Regency Guam Hotel ("Hotel"). In exchange, EIEG executed a construction loan agreement, note, and mortgage on the Hotel. The mortgage allowed the Bank to foreclose on the Hotel if EIEG defaulted on the loan.

EIEG defaulted on the loan in 1993. The loan was extended for one year, but then fell back into default. A Forbearance Agreement was executed by the parties, but collapsed. EIEG has made no payment to the Bank since 1995.

Facing possible foreclosure, EIEG filed suit against the Bank and the other lenders in Guam Superior Court in August 1995. The Bank counterclaimed. The other lenders were dismissed by stipulation. In June 1999, the Guam Superior Court enjoined the Bank from foreclosing on the Hotel.

In August of 1999, the Bank assigned to the Resolution and Collection Corporation ("RCC"), a Japanese corporation, its notes, security instruments, and claims in the litigation with EIEG. In January 2000, the Bank moved to join the RCC as a defendant and counterclaimant under Guam Rule of Civil Procedure 25(c).[1] Two months later, EIEG stipulated to the RCC's voluntary joinder. The court filed a joinder order. The RCC then immediately removed the entire action to federal district court under the provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1601-1611.

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[1] Guam Rule of Civil Procedure 25(c) is identical to Federal Rule of Civil Procedure 25(c).

Thereafter, the parties engaged in mediation on the island of Maui, Hawaii. At the end of the mediation session, and just six days before the trial in federal district court was scheduled to begin, the parties executed a document they called the "Maui Term Sheet," settling the present litigation and agreeing to dismiss a related action.

In an attempt to iron out their remaining differences, the parties engaged in further negotiations. Those negotiations proved fruitless, however, and the parties reached an impasse. The parties then filed motions in federal district court, asking the court to interpret and enforce the Maui Term Sheet. The court filed an order in July 2001, interpreting and enforcing the Maui Term Sheet. That order held that the Maui Term Sheet constituted an enforceable settlement agreement. Additionally, it interpreted several of the provisions of the agreement whose meaning the parties disputed, and required that the parties conform to those interpretations.

The parties nonetheless failed to agree on the forms of the releases to be executed between them and, therefore, failed to close the deal by the August 9, 2001, deadline provided in the Maui Term Sheet. The Bank and the RCC asked the district court to schedule the case for trial, claiming that this was the remedy called for in the Maui Term Sheet. EIEG countered with a motion to enforce the settlement, maintaining that the court should order specific performance of the agreement. In two orders issued in May of 2002, the district court held that it had the power to enforce the settlement agreement summarily. It interpreted the disputed provisions and ordered the parties "to do everything in their power to implement the settlement." The district court set a new closing date of November 25, 2002. Instead of working to close the deal by

that date, the parties brought these timely appeals of the district court's two May 2002 orders.[2]

STANDARDS OF REVIEW

The existence of subject matter jurisdiction under the FSIA is a question of law that we review de novo. *Park v. Shin*, 313 F.3d 1138, 1141 (9th Cir. 2002). We review a district court's findings of fact for clear error. *Freeman v. Allstate Life Ins.Co.*, 253 F.3d 533, 536 (9th Cir. 2001).

DISCUSSION

EIEG presents four arguments to support its assertion that removal of the case to federal court was improper. EIEG argues that: (A) the RCC is not a "foreign state" within the meaning of the FSIA; (B) the action is not "against" the Bank and the RCC, so the FSIA's removal provision does not apply; (C) the RCC could not remove because it is an assignee that took the assignment after the litigation was underway, and then voluntarily joined the litigation; and (D) the RCC submitted itself to the jurisdiction of the Guam Superior Court. We will address each of those arguments in turn.

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[2] In this opinion, we address EIEG's challenge to subject matter jurisdiction. Because we hold that the district court has jurisdiction, we reach the remaining issues raised in the appeal and in the cross-appeal.

Those remaining issues involve settled questions of law. We therefore address them in a separate memorandum disposition filed today, in which we reverse the district court's rulings and remand the case for trial. *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, No. 02-16214, 2003 WL 678105 (9th Cir. Feb. 27, 2003) (unpublished disposition).

A. *The RCC Is a Foreign State Under the FSIA.*

The Foreign Sovereign Immunities Act provides the exclusive source of subject matter jurisdiction over suits involving foreign states and their instrumentalities. *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1459 (9th Cir. 1995); *Joseph v. Office of Consulate Gen. of Nig.*, 830 F.2d 1018, 1021 (9th Cir.1987). The FSIA grants federal courts subject matter jurisdiction over actions brought against "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). "An 'agency or instrumentality of a foreign state' means any entity"

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b).

The parties, and we, agree that the RCC satisfies the requirements of § 1603(b)(1) and (b)(3). The only point of dispute is whether the RCC satisfies one of the alternative conditions of § 1603(b)(2). "[T]here are two ways in which an entity can fulfill the requirements of § 1603(b)(2). *Either* the entity can be an 'organ of a foreign state,' *or* the entity can have a majority of its shares or other ownership interest owned by 'a foreign state or a political subdivision thereof.'" *Corporacion Mexicana de Servicios Maritimos,*

S.A. de C.V. v. M/T Respect, 89 F.3d 650, 654 (9th Cir. 1996) (quoting *Gates*, 54 F.3d at 1461). In this case, the first condition is met, so we need not consider the second.[3]

We have observed that "[the FSIA]'s legislative history suggests that Congress intended the terms 'organ' and 'agency or instrumentality' to be read broadly." *Gates* 54 F.3d at 1460. For example, the House Report stated that

> entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. No. 94-1487, at 15-16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614. We have also explained:

> In defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of the foreign government. In making this determination, courts examine the

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[3] We have held that, under the FSIA, a corporation owned by an agency or instrumentality of a foreign government is not itself an instrumentality of that government. *Gates*, 54 F.3d at 1462. The Supreme Court has recently granted certiorari on this question. *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *cert. granted in part*, 122 S. Ct. 2657 (2002). As the law currently stands, the RCC does not satisfy the "majority of shares owned by a foreign state" test. The pendency of *Patrickson* in the Supreme Court does not affect our decision here, however, because we rest our decision on a separate ground.

> circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law.

Patrickson v. Dole Food Co., 251 F.3d 795, 807 (9th Cir. 2001), *cert. granted in part*, 122 S. Ct. 2657 (2002) (citing *Corporacion Mexicana*, 89 F.3d at 654-55; *Gates*, 54 F.3d at 1461). An entity may be an organ of a foreign state even if it has some autonomy from the foreign government. *Patrickson* 251 F.3d at 808; *see also Gates* 54 F.3d at 1461 (stating that because "the [state] is not directly involved in the day-today activities of [the entity] does not mean that it is not exercising control over the entity").

The Japanese government created the RCC expressly to perform a public function. The district court found that the RCC was created pursuant to several laws enacted by the Japanese Diet, namely Article 3.1 of *Tokeutei Jutaku Kinyu Senmon Kaisha no Saiken Saimu no Shori no Sokushin tou ni kansuru Tokubetsu Sochi Hou*, and supplementary provisions of *Yokin Hoken Hou*. The district court stated that "[t]he Japanese government created the RCC to carry out Japanese national policy related to revitalization of the Japanese financial system." Additionally, the district court found that "[o]ne of the primary functions of the RCC is to purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions, such as [the Bank], at the request of the Deposit Insurance Corporation of Japan, ('DICJ'), in accordance with Japanese Law." The district court also noted that many of the RCC's activities are performed exclusively by the RCC and the DICJ and that "[o]ther companies are not permitted to perform such activities

even if they are in the loan collection business." Further, the district court found that "[t]he RCC is funded by the Japanese government," that "Japanese law provides that the [government-owned] DICJ will compensate the RCC for all losses at the end of every fiscal year," and that "[t]he financial impact of any failure to collect the [EIEG] loans and guarantees assigned by [the Bank] to the RCC, or of a monetary damage award . . . in favor [of] EIE Guam against the RCC, will ultimately be borne by the Japanese government and the Japanese taxpayers." The district court's findings of fact all are supported in the record and thus are not clearly erroneous.

Those factors all point toward the RCC's being an organ of the Japanese government and, therefore, an "instrumentality" covered by the FSIA. EIEG attempts to overcome the weight of those factors by pointing out that the RCC is a private company that is engaged in a primarily commercial concern; that 29 other Japanese companies are authorized by the Japanese Ministry of Justice to collect distressed loans and assets; that the RCC's employees are not civil servants; and that the RCC is not a public corporation, a designation which, in Japan, is reserved for corporations established by the national government by special law as instruments for activities required by the state.

None of those arguments is availing. A company may be an organ of a foreign state for purposes of the FSIA even if its employees are not civil servants. *Gates*, 54 F.3d at 1461. As discussed above, the RCC and the DICJ engage in exclusive functions that other loan collection companies may not perform. As to the commercial nature of the RCC's work, we have held that "Congress' statement in the legislative history that a 'state trading company'

and 'an export association' can be 'organs' of a foreign state indicates Congress' belief that an entity's involvement in commercial affairs does not automatically render the entity non-governmental." *Id.* Finally, the district court's key assertion that the RCC's purpose "is to carry out Japanese national policy related to the revitalization of the Japanese financial system" is well supported in the record.

On balance, the relevant factors weigh in favor of a conclusion that the RCC is an organ of Japan. Additionally, the RCC compares favorably with other entities that we have labeled "organs" of foreign states under the FSIA.

In *Gates*, we held that Alberta Pork, a Canadian marketing board for hog producers formed pursuant to Alberta law, was an organ of the Province of Alberta. *Id.* This was so despite the fact that the Alberta Agricultural Products Marketing Council, which established the board, did not exercise day-to-day control over the board, but had only an "active supervisory role." *Id.* at 1460. The Council could authorize the board to set quotas for hog farmers, require farmers to provide information relating to the production and marketing of specified products, pay service charges, and the like. *Id.* at 1461. Noting the many ways in which the Council could delegate tasks to Alberta Pork, we held that the board was an organ of the Province of Alberta. *Id.*

In *Corporacion Mexicana*, we held that a subsidiary of a Mexican agency that owned and exploited that nation's petroleum resources was an organ of Mexico. The subsidiary was a separate legal entity. It was empowered to own property and carry on business in its own name and was administered by eight board members who were appointed

by the federal government. 89 F.3d at 654. The government of Mexico guaranteed the subsidiary's performance. *Id.* In holding that the subsidiary was an organ of Mexico, we quoted the district court's explanation that

> "[the subsidiary] is an integral part of the United Mexican States. [It] was created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation; it is entirely owned by the Mexican Government; is controlled entirely by government appointees; employs only public servants; and is charged with the exclusive responsibility of refining and distributing Mexican government property."

Id. at 655.

The RCC shares important similarities with the Mexican subsidiary in *Corporacion Mexicana*: Each body was created directly by public law, and the government guaranteed each body's performance. The RCC is even more clearly an organ of a foreign state than Alberta Pork was in *Gates*.

In view of the circumstances of its founding; its funding and financial connection to the government and taxpayers of Japan; its mission; and its purpose, we hold that the RCC is an organ of the Japanese government. It is therefore a "foreign state" within the meaning of the FSIA and is entitled to exercise the rights afforded foreign states under the FSIA.

B. *The Action By EIEG Is "Against" the RCC.*

Title 28 U.S.C. § 1441(d) permits removal to federal district court[4] of "[a]ny civil action brought in a State court[5] *against* a foreign state as defined [by the FSIA]." (Emphasis added.) EIEG asserts that this action was not removable under § 1441(d) because EIEG brought no claims "against" the RCC. In support, EIEG cites the well-worn maxim that the plaintiff's power to prevent removal

> continues with the plaintiff throughout the litigation, so that whether such a case [is] nonremovable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may . . . order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings. . . .

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[4] The District Court of Guam may exercise jurisdiction, even though it is not an Article III court. "The District Court of Guam shall have the jurisdiction of a district court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of Title 28, and that of a bankruptcy court of the United States." 48 U.S.C. § 1424(b).

[5] The territorial courts in Guam qualify as "State" courts for this purpose.

> The relations between the courts established by the Constitution or laws of the United States and the local courts of Guam with respect to . . . removal of causes . . . shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings[.]

48 U.S.C. § 1424-2.

Great N. Ry. Co. v. Alexander, 246 U.S. 276, 282 (1918); *see also Self v. Gen. Motors Corp.*, 588 F.2d 655, 658-59 (9th Cir. 1978) (citing *Great N. Ry. Co.*).

We are not persuaded. EIEG clearly is asserting a claim against the RCC, even though EIEG did not explicitly name the RCC as a defendant. As the district court correctly observed:

> The complaint asserts substantial claims against the RCC, as the assignee of [the Bank's] interest in the loans, mortgages, guarantees and security interests relating to the Hotel. Inter alia, EIE Guam's action seeks to preclude the RCC from enforcing those agreements and mortgages. EIE Guam also asserts that the RCC is affirmatively liable to EIE Guam for damages, at least through setoff.
>
> The primary issue in dispute relates to the validity and enforceability of the loans, mortgages, guarantees and security interests executed by EIE Guam in favor of [the Bank] relating to the Hotel. [The Bank] has assigned the loans, mortgages, guarantees and security interests to the RCC. EIE Guam is no more willing to honor its obligations . . . now that they have been assigned to the RCC. . . .

The district court cited the Second Circuit's decision in *Citibank, N.A. v. Nyland (CF8) Ltd.*, 878 F.2d 620 (2d Cir. 1989), for the proposition that minimal adversity between a foreign state and the plaintiff suffices to justify the foreign state's removal of the action pursuant to the FSIA. In *Nyland*, one defendant alleged that the Philippines was only a "nominal defendant" and that, therefore, the Philippines did not have the power to remove the case to

federal court under § 1441(d). *Id.* at 624. The Second Circuit disagreed, stating:

> There is nothing in the text of the statute or in the legislative history to support [appellant's] contention that the Philippines' interests must be completely adverse to those of the plaintiff in order to remove this case to a federal court. . . . The Philippines has adequately demonstrated that its interests are adverse to those of Citibank. We therefore reject appellant's contention that the case should have been remanded to state court.

Id.

We agree with the Second Circuit's approach. In this case, there is no question that the RCC's interests are adverse to EIEG's. Nor can there be any doubt that EIEG's claim is "against" the RCC in a logical sense – EIEG seeks rulings from the court that would permit it to avoid paying money to the RCC that the RCC claims it is owed. The only question is whether EIEG can avoid this obvious result simply by choosing not to name the RCC in its complaint. It cannot.

EIEG quotes the principle that, to determine whether an originally nonremovable case became removable, we must rely "solely upon the form which the plaintiff by his voluntary action shall give to the pleadings." *Self*, 588 F.2d at 659. That passage does not support EIEG's assertion that its mere failure to name the RCC explicitly as a defendant means that this is not an action against the RCC. EIEG's "voluntary action," for example its litigation efforts to avoid paying a debt to the RCC, have in fact created claims against the RCC. In *Self*, the same case on which EIEG relies, we made clear that "the determination of whether federal subject-matter jurisdiction exists

depends only upon plaintiff's complaint *and the context* in which it is found." *Id.* (emphasis added). We are not limited to the pleadings but must also examine the context of the case as a whole.[6] In other words, we do not exalt form over substance. The context of this case shows that it is in substance an action against the RCC, among other parties.

C. *The RCC May Remove Despite the Fact That It Is a Voluntarily Joined Assignee.*

EIEG argues that, even if the RCC is a foreign sovereign, the RCC may not remove because it obtained its interest voluntarily after the litigation had commenced. As a voluntarily joined assignee, EIEG claims, the RCC may exercise only the removal rights (if any) that were available to the original defendant, the Bank. The question we must answer is whether a foreign sovereign defendant who gained its interest in the litigation voluntarily, through an assignment after the suit had commenced, may remove the case to federal court under the FSIA's removal provision, 28 U.S.C. §1441(d).

1. *The Text of the Removal Statute of the FSIA*

To answer that question, we begin with the text of the statute. *See Coronado-Durazo v. INS*, 123 F.3d 1322, 1324

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[6] Indeed, immediately after stating this principle, the *Self* court provided a footnote containing the example of *Southern Pacific Co. v. Haight*, 126 F.2d 900, 903-04 (9th Cir. 1942). In *Haight*, the action was not removable based on the plaintiff's pleadings but *became* removable based on the plaintiff's subsequent conduct, even though the pleadings were never amended. *See Self*, 588 F.2d at 659 n.5.

(9th Cir. 1997) (stating principle). The removal procedure established by 28 U.S.C. § 1441(d) reads:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

On its face, § 1441(d) contains no restrictions on a foreign sovereign's right to remove. Indeed, even the usual time limit on the right of removal is relaxed. Under the most natural reading of the statute, a foreign sovereign that obtained a defendant's interest by assignment satisfies the criteria contained in the removal provision. Here, for instance, the suit (1) is a civil action, (2) was brought in State court, (3) and is against the RCC, a foreign state. Under a straightforward reading of § 1441(d), then, a later-joined foreign sovereign assignee apparently enjoys the same right of removal as a foreign sovereign that is an original defendant in a suit filed in state court.

Nevertheless, there is another plausible reading of the statute that could justify an opposite conclusion. When a plaintiff sues a nonforeign sovereign defendant in state court, only to have the original defendant transfer an interest in the case to a foreign sovereign that then joins and removes, arguably the action was not "brought . . . against a foreign state," 28 U.S.C. § 1441(d), but rather was *transformed* into such an action after the case was "brought."

That reading is not unreasonable theoretically, but it *is* inconsistent with the way courts have interpreted the statute in other contexts. For example, other circuits have held that a foreign state that is brought into an action as a third-party defendant, rather than as an original defendant by the plaintiff, may remove the entire action to federal court. *See, e.g.*, *Davis v. McCourt*, 226 F.3d 506, 509 (6th Cir. 2000) ("We find that . . . 28 U.S.C. § 1441(d) allows a foreign third-party defendant to remove an entire action from state court to district court."); *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 942 (7th Cir. 1996) (citing *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990), with approval); *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1259 (11th Cir. 1992) ("The [FSIA] . . . intended to render uniform in procedure and substance the treatment of foreign sovereigns subjected to suits in American courts. Making a federal forum available to a foreign state furthers this goal, whether the foreign state is a defendant or a third-party defendant." (citations and internal quotation marks omitted)); *Nolan*, 919 F.2d at 1065 ("[W]e can perceive no significant distinction between the authorization for removal of an entire action by a sovereign co-defendant, and removal of an entire action by a sovereign third-party defendant."). Obviously, if a foreign state is brought into an action as a third-party defendant, the civil action was not *originally* "against" a foreign sovereign. Nevertheless, a foreign sovereign may remove pursuant to the FSIA in such circumstances. That the action is "against" the foreign sovereign at the time of the removal suffices to satisfy the requirements of the FSIA.

In short, there is nothing in the text of 28 U.S.C. § 1441(d), as interpreted by our sister circuits, to support EIEG's argument that a foreign state must be an *original*

defendant in order to enjoy the power to remove under the FSIA. However, as EIEG points out, the RCC is not a third-party defendant, brought into this litigation without its active consent. Rather, it is a *voluntarily* joined defendant.

The fact that a foreign state that is brought into an action *involuntarily* may remove under § 1441(d) does not necessarily mean that a foreign state that chooses *voluntarily* to join litigation in progress, even as a defendant, enjoys the same right.[7] Because the text of the FSIA removal statute does not answer this question, we turn next to its legislative history to ascertain Congress' intent. *See United States v. Davidson*, 246 F.3d 1240, 1246 (9th Cir. 2001) ("Where the plain language of a statute is ambiguous, a court may go beyond the words of the statute to examine the textual evolution of the [contested language] and the legislative history that may explain or elucidate it." (citations and internal quotation marks omitted)).

2. *Congressional Intent*

The House Report for the FSIA states: "In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority

[7] No circuit has answered this precise question. A judge of the Northern District of Texas has held that a foreign sovereign intervenor may not remove the case to federal court under the FSIA. *J. Baxter Brinkman Oil & Gas Corp. v. Thomas*, 682 F. Supp. 898 (N.D. Tex. 1988). For the reasons detailed in this opinion, we are not persuaded by that court's conclusion.

to remove to a Federal forum actions brought against them in the State courts." H.R. Rep. No. 94-1487, *32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6631. Indeed, the House Report reflects Congress' belief that allowing foreign sovereigns to litigate in federal courts is *so* important that sovereigns should be permitted to drag along unconsenting co-defendants into federal court:

> New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the States in which the action has been brought.

Id.

The House Report indicates that Congress did not intend to allow foreign sovereigns to sit on their removal rights indefinitely, only to exercise them at a more strategic point in the litigation. However, although foreign sovereigns do not have carte blanche, the usual time limitations on removal are more relaxed for foreign states than for other defendants, clearly suggesting that Congress contemplated the possibility of "late" removal by a foreign state:

> As with other removal provisions, a petition for removal must be filed with the appropriate district court in a timely manner. (28 U.S.C. 1446.) However, in the view of the 60-day period provided in section 1608(c) in the bill and in view of the bill's preference that actions involving foreign states be tried in federal courts, the time limitations for filing a petition of removal under 28 U.S.C. 1446 may be extended "at any time" for good cause shown.

Id.

Logically, Congress' twin concerns – the potential political sensitivity of actions against foreign states and the importance of developing a uniform body of federal law in this area – apply equally to a foreign state that is a "voluntary" defendant and to a foreign state that is an "involuntary" defendant. If the foreign sovereign's interests are at play, the "voluntary" nature of the sovereign's participation does nothing to diminish Congress' concerns about the need for sensitivity to foreign states and the need for uniformity of law in this area.

In this case, of course, the RCC knew that the present litigation was underway when it acquired its interest in the litigation. However, the RCC took on that interest pursuant to the policies of the government of Japan, and any obligations arising from a judgment in EIEG's favor would be borne by the government and the taxpayers of Japan. The need for sensitivity and uniformity is as strong here as in any other circumstance in which a foreign sovereign is a defendant.

EIEG counters that, despite the legislation's history and stated aims, Congress did not *expressly* allow voluntarily joining foreign states to remove under the FSIA. From this silence EIEG infers two things: First, that Congress must have meant to fall back on the "default" rule that an intervening party may not assert rights that could not have been asserted by the original parties and, second, that the existence of other statutes that do expressly permit post-joinder removal requires us to conclude that Congress intentionally forbade post-joinder removal here. We will address each of those arguments in turn.

(a) *The "Default" Rule*

As the main support for its first theory, EIEG cites two Supreme Court cases, dating from the mid-1880s, for the proposition that intervening assignees may not remove a case to federal court when the original defendant could not do so. Here, of course, it is undisputed that the Bank could not, and did not, remove the case to federal court.

The first case cited is *Cable v. Ellis*, 110 U.S. 389 (1884). There, an intervenor acquired, through assignment, rights in a diversity action that was already in progress. The Supreme Court held that the intervenor "can do nothing that might not have been done for him by his representative without his intervention. [The intervenor] took his place by intervention in the suit subject to all the disabilities that rested at the time on the party in whose stead he is to act." *Id.* at 398.

The second case that EIEG cites is *Jefferson v. Driver*, 117 U.S. 272 (1886). *Jefferson* also was a diversity case, in which the assignee was brought into the suit as a purchaser of the property at issue in the action. The Supreme Court held that, under *Cable*, the intervenor was not entitled to remove, because "[b]y purchasing *pendente lite* he connected himself with the suit, subject to the disabilities of the other parties in respect to a removal at the time he came in." *Id.* at 274-75.

Cable and *Jefferson* will not bear the weight for which EIEG contends. These cases were decided almost one hundred years before the enactment of the FSIA and the concomitant creation of removal rights in foreign states. Thus, these cases cannot and do not speak directly to the question of what Congress intended the FSIA rule to be. Their only potential value is, as EIEG claims, for the

purpose of showing that there was a "background rule" against which Congress was acting, and thereby inferring from Congress' silence on the question of voluntarily joined foreign states that Congress understood and acquiesced in this background rule's application. Because of the legislative history showing that Congress rejected the diversity paradigm for foreign states when it passed the FSIA, we do not find these cases to be persuasive authority for even so limited a proposition.

Cable and *Jefferson* were diversity cases. In 1976, by enacting the FSIA, Congress indisputably removed foreign sovereigns from the diversity statutes.

Before the passage of the FSIA, the only source of a federal district court's subject matter jurisdiction in a case brought against a foreign state was the diversity jurisdiction provided by 28 U.S.C. § 1332(a)(2) and (3) (1970). *See* Jonathan Remy Nash, *Pendent Party Jurisdiction Under the Foreign Sovereign Immunities Act*, 16 B.U. Int'l L.J. 71, 75 (1998). Those provisions provided subject matter jurisdiction over

> all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between –
>
> . . . .
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 1332(a)(2), (3) (1970).

The basis of federal jurisdiction in a suit against a foreign citizen or state was thus grounded entirely in diversity. The requirements were the same as for a suit by a citizen of one State against a citizen of another state. *Id.*

In passing the FSIA, Congress removed foreign sovereigns from the diversity category altogether. Now, the FSIA "is the sole basis of subject matter jurisdiction over suits involving foreign states and their agencies and instrumentalities." *Phaneuf v. Republic of Indon.*, 106 F.3d 302, 304 (9th Cir. 1997). Unlike diversity jurisdiction, where an amount-in-controversy threshold – now $75,000 – remains, 28 U.S.C. § 1332, the FSIA contains no amount-in-controversy requirement, 28 U.S.C. § 1441(d). In other words, FSIA jurisdiction is its own special kind of federal jurisdiction and was intentionally divorced from diversity jurisdiction.

Significantly, Congress removed only foreign states – not foreign citizens – from the diversity statute. The only way for federal courts to exercise jurisdiction over controversies against foreign citizens still is through diversity. 28 U.S.C. § 1332. Congress clearly understood that it was singling out foreign sovereigns for special treatment when it created a new, exclusive basis of federal jurisdiction for cases involving foreign states.

Similarly, with respect to removal procedures, before the FSIA was enacted there was no special removal procedure available to a foreign state that was sued in state court. *See* Nash, 16 B.U. Int'l L.J. at 75. A foreign state could remove the action only under the "actions removable generally" provisions of 28 U.S.C. § 1441(a) (1970). When it passed the FSIA, Congress created a new removal statute, 28 U.S.C. § 1441(d). In short, not only did

the FSIA create subject matter jurisdiction in the federal courts for actions against foreign states, but it also created an entirely new mechanism for removing such cases to the federal courts. The pre-FSIA diversity-based mechanisms were simply replaced for foreign states.

Even if *Cable* and *Jefferson* were the backdrop against which Congress acted in 1976, Congress demonstrated its intention to change the removal scenery. Congress transferred foreign states from diversity jurisdiction to their own special jurisdictional category. At the same time, Congress granted foreign sovereigns extraordinary removal rights. *See Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1409 (9th Cir. 1989) (stating that "Congress explicitly drafted subsection 1441(d) as a provision to which the generally-applicable rules of removal do not apply").

(b) *Other Removal Statutes*

We next consider EIEG's argument that the FSIA, unlike some other federal statutes, does not explicitly grant a right of removal to foreign states after a transfer of a party's interest during the pendency of litigation. Citing the familiar canon of statutory construction that we should give effect to such a distinction, *Gov't of Guam, ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 638 (9th Cir. 1999), EIEG argues that Congress' silence on the matter in the FSIA displays Congress' intent *not* to provide foreign states with a right of post-joinder removal to federal court.

EIEG points specifically to two provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. The first provision permits the Resolution

Trust Corporation ("RTC") to remove an action to federal court after becoming a party:

> The [RTC] . . . may remove any action, suit, or proceeding from a State court to the United States district court. . . . The removal of any such suit or proceeding shall be instituted –
>
> (i) not later than 90 days after the date the Corporation is substituted as a party, or
>
> (ii) not later than 30 days after service on the Corporation, if the Corporation is named as a party in any capacity and if such suit is filed after August 9, 1989.

12 U.S.C. § 1441a(*l*)(3)(A).

The other provision that EIEG cites pertains to the Federal Deposit Insurance Corporation ("FDIC") and allows the FDIC to remove after it has been substituted as a party:

> [T]he Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.

12 U.S.C. § 1819(b)(2)(B).

EIEG reads too much into those statutes. Those statutes allow the RTC and the FDIC, respectively, to remove "any" state-court action to federal district court. The references to the RTC's and the FDIC's substitution as a party appear only as part of the *timeliness* calculation. The substantive grant of the right to remove is contained

in the first portion of each statute, which sets out that the corporation may remove "any" state-court action; the later reference to substitution only clarifies when the corporation may remove after joining. Indeed, the later reference to time restrictions on the removal right of a substituted corporation would be nonsensical if the earlier portion of the statute, granting the right to remove, did not encompass the right to remove after substitution.

Similarly, the FSIA allows a foreign state to remove "any" action brought against it in a state court. Instead of measuring the timeliness of a foreign state's removal by reference to the date on which the foreign state was named as a party, or became a party by substitution or joinder, Congress referred back to the usual "time limitations of section 1446(b)" and said that those time limits "may be enlarged *at any time* for cause shown." 28 U.S.C. § 1441(d) (emphasis added). If the time limits may be enlarged *at any time*, they may be enlarged after the foreign state has become a party by substitution or joinder so long as the district court concludes that the foreign state has showed good cause for the failure to meet the baseline time requirements of § 1446(b).

3. *Summary*

Title 28 U.S.C. § 1441(d) provides that "[a]ny" civil action brought in state court against a foreign sovereign may be removed by the sovereign to federal court. The legislative history of the FSIA reveals Congress' robust intention to allow foreign states access to the federal courts subject only to a reasonable enlargement of the time for removal, *id.*, and the existing check on abuse of that right:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

28 U.S.C. § 1359.[8] Section 1441(d) consistently has been interpreted to allow foreign states that are named as third-party defendants in a state case already in progress to remove to federal court. The policies that led Congress to provide a federal forum to foreign states is just as strong when those states acquire an interest in ongoing litigation, and when they voluntarily join such litigation, as when they are named originally as defendants. We hold that a foreign state that acquires a defendant's interest in state-court litigation by assignment may remove the case to federal court under the FSIA, even if the foreign state joins the litigation voluntarily.

D. *The RCC Did Not Submit To the Jurisdiction of the Guam Superior Court.*

Even though the RCC enjoyed the right to remove the case to federal court, it is possible that it waived that right. "A party, generally the defendant, may waive the right to remove to federal court where, after it is apparent that the case is removable, the defendant takes actions in state court that manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to a federal forum." *Resolution Trust Corp. v. Bayside*

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[8] No claim was made in this case that the district court lacked jurisdiction because of 28 U.S.C. § 1359.

Developers, 43 F.3d 1230, 1240 (9th Cir. 1994). "A waiver of the right of removal must be clear and unequivocal." *Id.* (citation and internal quotation marks omitted).

The RCC did nothing to waive its right to remove this case. The RCC filed a motion to remove the action the day after it was joined as a defendant. EIEG claims that the RCC led EIEG to believe that the RCC would not remove the action, but those pre-joinder statements were not a clear and unequivocal abandonment of the right to a federal forum. Once the case became removable, the RCC removed it immediately. We already have held that the act of joining itself did not destroy the RCC's right to remove.

CONCLUSION

The RCC is a foreign state within the meaning of the FSIA. The present action is "against" the RCC as well as the Bank. The RCC was entitled to remove the case to federal court under the FSIA, even though it accepted assignment of an interest in the litigation during the course of the litigation, and even though it joined the action voluntarily after the action was already underway. Finally, the RCC did not waive its right to remove. Accordingly, the district court correctly held that it has subject matter jurisdiction. We AFFIRM the district court's exercise of jurisdiction and, for the reasons stated in a separately filed memorandum disposition concerning the merits of the appeal and the cross-appeal, REVERSE the district court's two May 2002 orders and REMAND the case for trial.

Each party shall bear its own costs on appeal.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EIE GUAM CORPORATION, a Guam corporation, Plaintiff-Appellant, v. THE LONG TERM CREDIT BANK OF JAPAN, LTD., now known as THE SHINSEI BANK, LTD., a Japanese corporation; and THE RESOLUTION AND COLLECTION CORPORATION, a Japanese corporation, Defendants-Appellees.	No. 02-16214 D.C. No. CV-00-00009-ER MEMORANDUM AND ORDER* (Filed Feb. 27, 2003)
EIE GUAM CORPORATION, a Guam corporation, Plaintiff-Appellee, v. THE LONG TERM CREDIT BANK OF JAPAN, LTD., now known as THE SHINSEI BANK, LTD., a Japanese corporation; and THE RESOLUTION AND COLLECTION	No. 02-16259 D.C. No. CV-00-00009-ER

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

CORPORATION, a Japanese corporation,

Defendants-Appellants.

Appeals from the District Court of Guam
Edward Rafeedie, District Judge, Presiding

Argued and Submitted January 13, 2003
San Francisco, California

Before: HUG, ALARCON, and GRABER, Circuit Judges.

The underlying debt that gives rise to this litigation pertains to a hotel property in Guam. The parties entered into a settlement agreement, called the Maui Term Sheet, but failed to concur on how it was to be carried out. The district court entered several orders interpreting and, ultimately, specifically enforcing the agreement. These appeals arise from the last two orders, which were entered in May 2002.

We have held in a separate opinion filed today that the district court has jurisdiction over this action. *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, ___ F.3d ___ (9th Cir. 2003). We now turn to the merits of the parties' claims.

Both parties breached the Maui Term Sheet.

EIEG breached by (1) tendering release forms that "carved out" claims intended to be preserved under the terms of the Maui Term Sheet; (2) tendering release forms requiring the Bank and the RCC's counsel to sign a form stating that the Bank and the RCC had authority to sign a release on behalf of the other lenders, a provision not required in the Maui Term Sheet; and (3) including "Roe" and "Doe" releases, contrary to the Maui Term Sheet.

The Bank and the RCC breached by tendering release forms that (1) insisted on EIE International, Inc.'s waiving the Guam law that prevented the release from reaching unknown claims, in violation of the provisions of the Maui Term Sheet; and (2) contained a "supremacy" clause that would have eliminated the effectiveness of the Maui Term Sheet, because the proposed master release differed materially from the terms of the settlement agreement.

These breaches were material. Because each party comes to court with "unclean hands," therefore, neither may obtain specific performance of its version of the agreement. The settlement itself is clear as to what was to happen in the event that the settlement could not be concluded: "all parties will request that the Court immediately commence the trial."

The district court did not commit clear error in denying the Bank and the RCC's motion to dissolve the June 1999 injunction. That injunction was explicitly based on the Guam Superior Court's perceived need to protect a "significant asset" belonging to EIEG and "a unique piece of property that cannot be replaced." Circumstances have not so changed so as to make the district court's refusal to dissolve the injunction clearly erroneous.

REVERSED and REMANDED for trial.[1]

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[1] The pending requests for judicial notice are GRANTED. When the mandate issues, this court's stay is DISSOLVED.

APPENDIX B

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

EIE GUAM CORPORATION, Plaintiff, vs. THE LONG-TERM CREDIT BANK OF JAPAN, LTD.; THE RESOLUTION AND COLLECTION CORPORATION, et al., Defendants.	Civil Case No. 00-00009 ORDER (Filed Jun. 7, 2000)
AND RELATED COUNTERCLAIMS	

This case comes before the Court on Plaintiff's Motion for Remand to the Superior Court of Guam and to levy fees and costs incurred against Long-Term Credit Bank of Japan, Ltd. ("LTCB"), the Resolution and Collection Corporation ("RCC") and their counsel as a result of bad faith removal.

I. BACKGROUND

A. Facts Regarding Original Parties

EIE Guam is a Guam corporation and was a wholly-owned subsidiary of the Japanese corporation EIEI. EIEI is a real estate developer which acquired and developed numerous properties throughout the world, including the Hyatt Regency Guam Hotel ("the Hotel"). EIE Guam alleges in this suit that LTCB seized control over EIEI and its subsidiaries such as EIE Guam.

In July 1992, during a time when EIE Guam alleges that LTCB was in control of EIEI and its subsidiaries, LTCB caused EIE Guam to enter a Construction Loan Agreement with a one-year term in the amount of $103 million. LTCB also caused EIE Guam to guarantee approximately $250 million of additional debt that EIEI allegedly owed to LTCB much of which was unrelated to EIE Guam. It is alleged that LTCB knew at the time that EIE Guam could not repay the debts to which LTCB compelled EIE Guam to agree. In 1995, LTCB sought to foreclose on EIE Guam's interest in the Hotel.

On August 2, 1995, EIE Guam filed the Complaint in this case, *EIE Guam Corp. v. The Long-Term Credit Bank of Japan*, Civil Case No. CV1190-95, in the Superior Court of Guam ("Superior Court"). By its Complaint, EIE Guam seeks the invalidation of certain loan and security transactions, reformation of debt, as well as damages against LTCB for breach of fiduciary duty, breach of contract, self-dealing and fraud. EIE Guam alleged in its Complaint that LTCB acquired a fiduciary duty to EIE Guam by taking control of EIE Guam's parent, EIEI, and through EIEI, taking control of EIE Guam. On November 21, 1995, LTCB filed its answer and counterclaims against EIE Guam and its parent at the time, EIEI.

Since the filing of the Complaint, over four years of aggressive and contentious litigation have passed. There have been over 68 motions, over 28 depositions taken in Guam, Tokyo, Osaka, Sapporo, Los Angeles, and New York, and approximately 300,000 pages of documents produced by the parties. Furthermore, the Superior Court has twice scheduled and then vacated the trial date in this case. Finally, in a Decision and Order issued on February 7, 2000, Judge Joaquin Manibusan set a September 2000

trial date. Judge Manibusan expressly stated that this trial date would not be continued.

B. Facts Regarding RCC's Entry into the Case

From October, 1998 until March 1, 2000, LTCB was 100-percent owned and controlled by the Deposit Insurance Company ("DIC"), the same "agency or instrumentality" of the Japanese government that now owns the RCC.

On August 10, 1999, EIE Guam was notified that LTCB's notes and security agreements would be transferred to the RCC on August 16, 1999. The RCC has expressly declined any assumption or responsibility of LTCB liability. EIE Guam expressed no objection to the RCC being joined in this case provided that the RCC would be bound by the decisions and acts of LTCB as well as the record in the case, and that there would be no further delays.

On March 2, 2000, the evening before EIE Guam's motion for partial summary judgment and motion to disqualify LTCB's main counsel, Sherman & Sterling, would be heard, Judge Manibusan signed the stipulated Joinder Order making the RCC a party herein. On March 3, 2000, the RCC removed the case to this Court.

II. DECISION

A. The Foreign Sovereign Immunities Act ("FSIA")

1. HISTORY OF THE FSIA

Until the mid-twentieth century the United States followed the absolute theory of sovereign immunity, under which all foreign states enjoyed complete immunity from U.S. courts. *See generally The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) (adopting the theory of absolute immunity for the United States). With the rise of international commerce and the resulting increase in domestic claims against foreign states for their commercial activities, the United States in 1952 adopted the restrictive theory of sovereign immunity (based on the Tate Letter)[1] – granting immunity to foreign states and their instrumentalities only for public noncommercial activities. *See generally* H.R. Rep. No. 94-1487, at 6-8 (discussing background of foreign sovereign immunity and resulting need for FSIA), reprinted in 1976 U.S.C.C.A.N. at 6605-07.

Although the guidelines outlined in the Tate Letter abrogated the scope of foreign sovereign immunity, they nevertheless created additional problems. For example, a foreign state had to apply for immunity with the U.S.

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[1] In 1952, the U.S. Department of State in the landmark letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman, adopted a legal standard known as the restrictive theory of sovereign immunity, by which it advised courts to grant foreign states immunity only for their public acts and not for actions arising out of their strictly commercial or private acts. 15 Fordham Int'l L.J. 1060, 1065 (1991/1992).

State Department, and the State Department in turn would determine whether to grant immunity. H.R. Rep. No. 94-1487, at 7, reprinted in 1976 U.S.C.C.A.N. at 6606. Political and diplomatic influences often weighed heavily in this decision, resulting in a lack of uniformity in treating these requests. *Id.* Furthermore, the Tate Letter gave little guidance concerning which activities were commercial and how to enforce judgments against foreign sovereigns. *Id.*

Congress attempted to solve some of these problems by enacting the Foreign Sovereign Immunities Act of 1976. *Foreign Sovereign Immunities Act of 1976*, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. Sections 1330, 1602-1611 (West 1994 & Supp. 1997)). The FSIA serves four main purposes, two of which are relevant here. First, the Act codifies the restrictive theory of sovereign immunity – granting immunity to foreign states (including their agencies or instrumentalities)[2] only for their public or sovereign activities, not for their commercial activities. H.R. Rep. No. 94-1487, at 7, *reprinted* in 1976 U.S.C.C.A.N. at 6606-07. Second, the Act takes foreign sovereign immunity determinations away from the State Department and gives them to the courts to ensure that such decisions will be based on legal rather than political/foreign policy grounds, thus, promoting consistency and uniformity in the treatment of foreign interests. *Id.* at 8-9, reprinted in 1976 U.S.C.C.A.N. at 6606-07. To accomplish these goals, the FSIA specifies which entities qualify as "foreign states" and grants them jurisdictional

[2] 28 U.S.C. 1603-04.

immunity from all U.S. courts (state and federal). 28 U.S.C. Sections 1603-04, subject to certain exceptions, 28 U.S.C. Section 1605. The FSIA dictates the circumstances under which a foreign state loses this immunity,[3] and provides that in such cases the federal district courts shall have original jurisdiction and that any trials will be without a jury. 28 U.S.C. Section 1330. Moreover, the Act amends the federal removal statute to specifically permit a foreign-state defendant to remove any action from state to federal court. 28 U.S.C. Section 1441(d).

2. "MAJORITY OWNERSHIP" AND "ORGAN OF A FOREIGN STATE" TESTS OF SECTION 1603(b)(2) OF THE FSIA

Under the FSIA, a foreign state includes its "agencies or instrumentalities." 28 U.S.C. Section 1603(a). An agency or instrumentality is in turn defined under 28 U.S.C. Section 1603(b) as:

> any entity – (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

The first step in the FSIA analysis is to determine who is the owner of the entity under the "ownership test." Instrumentality status under the majority-ownership

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[3] 28 U.S.C. Section 1605.

provision should be based solely on the question: Are a majority of the entity's shares or other ownership interests directly owned by a foreign state or political subdivision thereof? Although Congress did not place a control requirement in the FSIA's majority-ownership provision, the types of entities that Congress meant to cover by the Act are at least minimally controlled by foreign states.

In the case at bar, the Japanese government created the RCC by statute and funded it. Because the RCC is owned by the DICJ, an instrumentality of the Japanese government, and not directly by the Japanese government, the Court holds that the RCC does not qualify as an agency or instrumentality under the majority-ownership provision. 28 U.S.C. Section 1603(b)(2).

In addition to the majority-ownership provision, the FSIA provides that "an agency or instrumentality of a foreign state means an entity . . . which is an organ of a foreign state or political subdivision thereof." 28 U.S.C. Section 1603(b)(2). This organ provision is necessary to complement the majority-ownership provision in determining agency or instrumentality status under the FSIA. Because the prerequisites for qualification under the organ provision are not precisely defined, the organ provision provides a flexible tool for analyzing the increasingly complex structures of entities seeking agency or instrumentality status. In a nutshell, "there is no clear test to determine whether or not an entity qualifies as an 'organ' of a foreign state." *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1084 (9th Cir. 1999). In evaluating whether an entity is an "organ" of a foreign state, the *Alpha* court identified a number of relevant factors to be considered, no single one of which is necessarily determinative. *Alpha Therapeutic*, 199 F.3d at 1084.

Such factors include details about the entity's creation, purpose, organization and operations. *Id.*

If an entity has failed to establish that it is an instrumentality as a matter of law under the majority-ownership provision, then based on a plain reading of Section 1603(b)(2) it may nevertheless show that it is an instrumentality as a matter of fact under the organ provision. 28 U.S.C. Section 1603(b)(2). For example, a foreign state may create an organization by statute, fund it, stipulate that it may be managed by state employees appointed by the state, and even require that its daily operations be subject to government supervision. The state may, however, allow this entity to be bought and placed under the control of a company directly owned by that state. Because this new entity is owned by an instrumentality of a state and not directly by the state itself, it does not qualify as an agency or instrumentality under the majority-ownership provision. 28 U.S.C. Section 1603(b)(2). Nevertheless, because this entity is virtually an alter ego of the state, and because one purpose of the FSIA is to avoid adverse relations with foreign governments,[4] the FSIA's protections may cover this new organization. Thus, although the entity may not qualify for agency or instrumentality status under the majority-ownership provision, it may still be an agency or instrumentality if it qualifies as an organ of the foreign state and should be afforded the opportunity to show that it does.

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[4] See H.R. Rep. No. 94-1487, at 13 (1976).

Based on a review of the case law discussed below it appears that the overarching guiding principle for determining whether an entity qualifies as an organ of a foreign state should focus on a determination of whether the entity is dedicated to performing specific duties that are determined by its parent state or states. Specifically, courts should ascertain whether (1) the foreign state or states decide the main duties or mission of the entity and (2) the foreign state or states have an active supervisory role in the entity's activities. This organ test is derived from elements that courts have found to indicate organ status, as well as from the Supreme Court's description of a "typical"[5] instrumentality of a foreign state. Following these guidelines, courts may consider a variety of factors to determine if an entity meets these two main requirements. For example, creation by government statute or decree may favor a finding that the government determined the mission of the entity, while funding by the government, a board of directors appointed by the government, a staff of public employees, or entity-specific

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[5] The Supreme Court shares the view that a foreign government should have some degree of control over an entity for it to be an agency or instrumentality of that foreign state. In *First National City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 624-25 (1983), the Court described what it considered to be a "typical government instrumentality." According to the Court, instrumentalities are usually created by the government by statute, managed by a board selected by the government, and aided monetarily by the government. The instrumentality has independence, however, to the extent that it is not usually subject to the personnel and budgetary regulations that apply to other government agencies: the instrumentality itself is responsible for its own finances, can sue and be sued in its own name, and may hold and sell property. *Id.*

regulations may each indicate the presence of active government supervision.

An example of the degree of government supervision required for organ status may be found in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), cert. denied, 116 S. Ct. 187 (1995). The *Gates* court determined that Alberta Pork, a corporation created by the Canadian government to market hogs, was an organ of the Canadian government. *Id.* at 1459, 1461. As the court summarized in a later decision, although the Canadian government did not exercise day-to-day control over Alberta Pork, it played an "active supervisory role" in that Alberta Pork:

> could only act on matters the government authorized; the government could order it to change its regulations; producers who were dissatisfied with a decision by Alberta Pork could appeal to an appellate body appointed by the government; and members of Alberta Pork's board were given immunity from liability similar to that given to government actors. *Corporation Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996) (citing *Gates*, 54 F.3d 1457).

In addition, the Ninth Circuit has enumerated several factors in evaluating organ status for companies. In *Corporation Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996) (hereinafter "CMSM"), the court determined that a Mexican oil-refining company (Pemex-Refining) was an organ of Mexico. The Court found it important that the company had been created by a combination of the Mexican Constitution, Mexican law, and presidential proclamation, and that the company had been charged with the responsibility

of refining and distributing oil for Mexico. *Id.* In other words, the Mexican government had determined the main duties or missions of Pemex-Refining. The Court also noted that Pemex-Refining was controlled by government appointees and employed only public servants. *Id.* Furthermore, Pemex-Refining's shares and acquisitions required government approval, and its employees were subject to regulations governing public servants. *Id.* These elements suggest that the Mexican government played an active supervisory role in Pemex-Refining's activities. Thus, the *CMSM* court's analysis illustrates how numerous factors may be considered in light of the overarching guidelines for organ analysis.

Finally, while the FSIA does not define "organ of a foreign state or political subdivision thereof," the Ninth Circuit, has held that the term "organ" is to be construed broadly. *Alpha Therapeutic*, 199 F.3d at 1084.

B. Determining Whether the RCC is an Agency or Instrumentality Under Section 1603(b)(2) of the FSIA

Based on the discussion above, the facts in this case will now be analyzed to determine whether the "organ" provision of Section 1603(b)(2) for agency or instrumentality status is met.

1. CREATION OF THE RCC

On April 1, 1999, the Japanese government created the RCC pursuant to certain laws enacted by the Japanese Diet, namely certain provisions of *Tokutei Jutoku Kinyu Senmon Kaisha no Saiken Saimu no Shori no Sokushin tou ni kansuru Tokubetsu Sochi Hou* (Law No. 93 of 1996

as amended) (the "Jusen Law") and certain provisions of the supplementary provisions of *Yokin Hoken Hou* (Law No. 34 of 1971 as amended) (the "Deposit Insurance Law"). (RCC Notice of Removal at 1). This fact strongly supports the conclusion that the RCC is an organ of the Japanese government.

2. PURPOSE AND NATURE OF THE RCC'S ACTIVITIES

The Japanese government created the RCC to carry out Japanese national policy related to revitalization of the Japanese financial system. *See* Jusen Law and Deposit Insurance Law. One of the primary functions of the RCC is to purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions, such as LTCB, at the request of the Deposit Insurance Corporation of Japan, ("DICJ"), in accordance with Japanese law. *Id.* Thus, the RCC's acquisition of LTCB's assets relating to the Hotel were actions mandated by the Japanese law and furthered important Japanese national policies.

In addition, the RCC's activities are currently limited to three areas, all of which are related to implementation of the national policy to revitalize the financial system of Japan and to minimize the Japanese taxpayers' burden in doing so. The activities of the RCC are as follows:

- the purchase, collection and disposition of non-performing assets from failed financial institutions in accordance with an agreement between the DICJ and RCC as prescribed under the Supplementary Provision of the Deposit Insurance Law.

- the purchase, collection, and disposition of assets purchased from financial institutions, including banks under Special Public Management (*tokubetsu kouteki kanri*) in accordance with an agreement between the DICJ and the RCC as prescribed under the "*Kinya Kinou no Saisei no tomeno Kinkyu Sochi ni kansuru Houritsu*" (the "Financial Reconstruction Law"); and

- the purchase, collection, and disposition of assets purchased from certain housing loan companies in accordance with an agreement between the DICJ and the RCC as prescribed under the Jusen Law. Junri Ozaki Declaration, p. 3.

These activities are exclusively performed by the DICJ and the RCC. Other companies are not permitted to perform such activities even if they are in the loan collection business. *Id.*

Thus, the exclusive performance of these specific functions mandated by Japanese law and regulations further buttresses the conclusion that the RCC is a government "organ" within the meaning of the FSIA.

3. OWNERSHIP OF THE RCC

The DICJ, which EIE Guam does not dispute is an "agency or instrumentality" of the Japanese government, owns 100% of the RCC. Under both *Gates* and *CMSM*, the DICJ's complete ownership does not qualify the RCC as an "agency or instrumentality" of the Japanese government under the "ownership" test, because the RCC is 100% owned by the DICJ, an instrumentality of the Japanese government, and not directly by the Japanese government. Therefore, it does not qualify as an agency or instrumentality under the majority-ownership provision. 28 U.S.C.

Section 1603(b)(2). However, it is further factual support for the conclusion that the RCC is an "agency or instrumentality" of the Japanese government under the "organ" test. In *CMSM*, for example, the Ninth Circuit held that the fact that Pemex-Refining was a wholly-owned subsidiary of an agency or instrumentality of the Mexican Government, together with other factors, established that it satisfied the "organ" test. 89 F.3d at 655.

4. SOURCE OF FUNDING FOR THE RCC

The RCC is funded by the Japanese government[6]. The financial impact of any failure to collect the EIE Guam loans and guarantees assigned by LTCB to the RCC, or of a monetary damage award – if any – in favor [of] EIE Guam against the RCC, will ultimately be borne by the Japanese government and the Japanese taxpayers. Japanese law provides that the DICJ will compensate the RCC for all losses at the end of every fiscal year (Article 10-2, Supplementary Provisions of the Deposit Insurance Law), and that the DICJ will make loans to the RCC, or guarantee loans obtained by the RCC, for funds which are necessary for the RCC to use to purchase assets and any other necessary expenses of the RCC. *See* Article 11.1, Supplementary Provisions of the Deposit Insurance Law.

Furthermore, if the RCC were liquidated, any proceeds from such liquidation would revert to the Japanese government and any shortfall would be covered by the Japanese government. Although government funding is not necessary in order for an entity to be a government

[6] Declaration of Akio Hanano p.3 para.3.

"organ," government funding is a key indicator that an entity is a government "organ." *Alpha Therapeutic*, 199 F.3d at 1084.

In conclusion, the RCC was created by the Japanese Diet pursuant to the Jusen Law and certain provisions of the Deposit Insurance Law. In addition, the purpose and nature of the RCC's activities is to carry out Japanese national policy related to the revitalization of the Japanese financial system. Moreover, the RCC is a wholly-owned subsidiary of the DICJ, which EIE Guam does not dispute is an agency or instrumentality of the Japanese government. All of the asset purchase agreements to be entered into by the RCC are determined by the DICJ (Articles 10.2 and 10.3 of the Supplementary Provisions of the Deposit Insurance Law), and approved by the Financial Reconstruction Commission, ("FRC"). All implementation plans and budget plans for the collection of the assets that are purchased by the RCC are subject to approval by the DICJ (Article 8.1.4 of the Supplementary Provisions of the Deposit Insurance Law). Furthermore, the RCC is funded by the Japanese government and is subject to government control and supervision. Therefore, the Court holds that the RCC is an "organ" of the Japanese government.

C. The FSIA Authorizes a Foreign Sovereign Joined as a Defendant to Remove

In the FSIA, Congress created a new category of federal subject matter jurisdiction, distinct from federal question and diversity jurisdiction. *In re Texas E. Trans. PCB Contamination Ins. Litig.*, 15 F.3d 1230, 1239 (3d Cir. 1994). The "enactment of the FSIA was in response to

unique policy considerations touching on international relations of the United States, considerations not apropo to the federal diversity statute." 15 F.3d at 1239 (3d Cir. 1993). Thus, although removal statutes based on diversity jurisdiction are strictly construed, this policy of strict construction "is not operative in the FSIA context." *Id.*

The FSIA removal provisions are to be liberally construed in order to further the Congressional intent that actions involving foreign sovereigns should be channeled "away from the State forums and into federal courts to be adjudicated in nonjury trials." *Texas Eastern*, 15 F.3d at 1239, 1241.

Although the FSIA does not confer exclusive jurisdiction in the federal courts, the FSIA reflects "Congress' unusually strong preference for adjudication of claims against foreign states in the federal court system." *Id.* As the Third Circuit has held:

> In letter and spirit, a liberal approach in implementing the FSIA's comprehensive jurisdictional scheme is most conducive to the FSIA's paramount objectives of keeping federal courts open to foreign states, and indeed of affirmatively encouraging private actions against foreign states to be adjudicated in federal court. *Id.* at 1241.

Section 1441(d) of Title 28 broadly states that "[a]ny civil action brought in a State court against a foreign state may be removed by the foreign state" to federal court. Neither the FSIA generally, nor 28 U.S.C. Section 1441(d) specifically, limits the right of an organ of a foreign state which joins an action as a defendant to remove. To imply such an exception to the FSIA removal provisions would be contrary to Congress' deliberate intent "to channel

cases against foreign sovereigns away from the state courts and into federal courts," *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983), and "Congress' unusually strong preference for adjudication of claims against foreign states in the federal court system." *Texas Eastern*, 15 F.3d at 1243. To prohibit an organ of a foreign sovereign, such as the RCC, from removing actions asserting claims against it after joinder as a defendant pursuant to Rule 25(c) would be to rewrite the FSIA's removal provisions in 28 U.S.C. Section 1441(d) and change a deliberate choice of legislative policy. *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 940 (7th Cir. 1996).

EIE Guam relies on a district court decision outside the Ninth Circuit: *J. Baxter Brinkman Oil & Gas Corp. v. Thomas*, 682 F. Supp. 898 (N.D. Tex. 1988). However, *Baxter Brinkman* is readily distinguishable and inapposite. The case involved intervention rather than joinder. This is significant because the rationale of the case is that the intervening party voluntarily interjected itself into an action that would otherwise not be binding on it. *Baxter Brinkman*, 682 F. Supp. at 900.

In contrast to the intervener in *Baxter Brinkman*, the RCC here simply cannot avoid being bound by the judgment either by not participating in the litigation in Guam Superior Court or by suing EIE Guam in federal court. As transferee of LTCB's right, title and interests in the loans and guarantees relating to the Hotel, the RCC will be bound by the judgment in this action regardless of whether it joined the action or filed another action in federal court. Guam R. Civ. P. 25(c); *Minnesota Mining & Mfg. Co. v. Eco Chem. Inc.*, 757 F.2d 1256, 1263-64 (Fed. Cir. 1985). The RCC thus has not "voluntarily interjected

itself" into the action in Guam Superior Court in the same sense that the intervenor did in *Baxter Brinkman*. To the contrary, joinder was the only way that the RCC could protect its own interests, including the right to invoke the FSIA. The RCC had to defend its interests in order to fulfill the mission that Japanese government had given it to perform.

D. REALIGNMENT OF PARTIES

To determine whether complete diversity exists, the Supreme Court has instructed the courts to look beyond the pleadings to the actual interests of the parties with respect to the subject matter of the law suit. *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 69, 62 S.Ct. 15, 86 L.Ed. 47 (1941). For realignment in diversity cases, the Ninth Circuit has adopted the "primary purpose" test. The primary purpose test first requires the federal court to isolate the "principal purpose of the suit" or the "primary and controlling matter in dispute." *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 n.2 (9th Cir. 1987). The federal court then aligns the parties according to their interests in the primary issue in dispute. "If the interests of a party named as a defendant coincide with those of the plaintiff in relation to the purpose of the lawsuit, the named defendant must be realigned as a plaintiff for jurisdiction purposes." *Id.* at 1523. In removal cases, if realignment destroys complete diversity, the case must be remanded for lack of subject matter jurisdiction.

Although the Ninth Circuit has not specifically addressed whether the realignment of parties principle applies in FSIA, cases, the Ninth Circuit has held that

"Congress explicitly drafted subsection 1441(d) as a provision to which the generally-applicable rules of removal do not apply." *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1409 (9th Cir. 1990).

Only two court of appeals decisions, neither of which is from the Ninth Circuit, have considered whether the realignment concept applies in the FSIA context: *Texas Eastern* and *Citibank, N.A. v. Nyland (CF8) Ltd.*, 878 F.2d 620 (2d Cir. 1989). Neither case, however, held that its action should be dismissed for lack of subject matter jurisdiction, or remanded to state court for lack of removal jurisdiction, based on realignment of the parties.

In *Texas Eastern*, two of Texas Eastern's excess insurers filed in state court a comprehensive declaratory relief action (relating to insurance coverage for the costs of toxic PCB clean up), in which all of Texas Eastern's other insurers were joined as defendants, including the Insurance Company of Ireland ("ICI"). 15 F.3d at 1234. ICI an agency or instrumentality of a foreign state under the FSIA, removed the case to federal district court pursuant to 28 U.S.C. Section 1441(d). *Id.* In seeking remand, "Texas Eastern argued that the defendant insurers . . . most notably ICI should be realigned . . . as plaintiffs to reflect their alleged substantive party designations, making the suit no longer 'against' a foreign state, and thus depriving the district court of FSIA subject matter jurisdiction." *Id.* at 1238-39. Although the district court concluded that "the principle of realignment is inapplicable in matters in which subject matter jurisdiction is

predicated on something other than diversity of citizenship,"[7] the Third Circuit reversed, holding that in FSIA cases the principle of realignment must be applied with "a liberal approach" consistent with "the FSIA's paramount objectives of keeping federal courts open to foreign states, and indeed of affirmatively encouraging private actions against foreign states to be adjudicated in federal court." *Id.* at 1241. The Third Circuit held "that the restrictive 'primary issue' test does not comport with the statutory language or legislative intent of the FSIA." *Id.* The Third Circuit instead applied the more lenient "substantial controversy" test which considers "whether the parties in question are really opposed according to their true interests in any of their substantial conflicts at issue in this litigation. *Id.*[8] Because the plaintiff insurers in *Texas Eastern* sought adjudication of their rights and obligations with respect to the other insurers, including ICI, and sought relief by way of contribution or indemnity from ICI, the Third Circuit held that the "substantial controversy" test was "more than adequately satisfied." *Id.* at 1241-42. Although the Third Circuit concluded that ICI did not satisfy the primary issue test, the Court went on to hold that "there is certainly an element of adversity between [plaintiffs] and ICI sufficient to satisfy Section 1330's

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[7] *Id.* at 1239.

[8] In dictum, the Third Circuit suggested that the FSIA's purpose of affirmatively encouraging private actions against a foreign state to be adjudicated in federal court might warrant "an even more lenient approach than the 'substantial controversy' test" and that "a federal court might recognize a plaintiff/defendant relationship of adversity if real adversity exists between the parties on any issue asserted in the plaintiff's complaint, regardless of the relevant significance of the issue." *Id.* (emphasis in original).

requirement that an action be brought 'against' a foreign sovereign." *Id.* at 1242.

Similarly, in *Nyland*, the Second Circuit held that minimal adversity between a foreign state and the plaintiff sufficed to justify the foreign state's removal of the action pursuant to the FSIA. In *Nyland*, Citibank filed an action in state court to foreclose on a mortgage secured by a leasehold interest held by Nyland (the borrower) in certain real property. Citibank also named as a defendant the Republic of the Philippines which claimed an interest in the property. The Philippines removed the action to federal court pursuant to 28 U.S.C. Section 1441(d). Nyland moved to remand the action, arguing that the Philippines should be realigned with the plaintiffs because "the Philippines is only a nominal defendant in this case . . . [,] its interests are compatible with those of Citibank . . . [it] took no active steps in this litigation and used this case only as a vehicle for collecting funds it is seeking in its own litigation against the Marcoses and their agents." *Id.* at 624.

EIE Guam not the RCC, chose to initiate this case in Guam Superior Court. The fact that the RCC has significant counterclaims against EIE Guam does not make the RCC the plaintiff. Moreover, the interests of the RCC and EIE Guam are diametrically opposed.

Therefore, the Court holds that the RCC is in fact and reality a defendant, not a plaintiff. Plaintiff EIE Guam initiated this action by filing its complaint in Guam Superior Court. The complaint asserts substantial claims against the RCC, as the assignee of LTCB's interest in the loans, mortgages, guarantees and security interests relating to the Hotel. Inter alia, EIE Guam's action seeks

to preclude the RCC from enforcing those agreements and mortgages. EIE Guam also asserts that the RCC is affirmatively liable to EIE Guam for damages, at least through setoff.

The primary issue in dispute relates to the validity and enforceability of the loans, mortgages, guarantees and security interests executed by EIE Guam in favor of LTCB relating to the Hotel. LTCB has assigned the loans, mortgages, guarantees and security interests to the RCC. EIE Guam is no more willing to honor its obligations under these loans, mortgages, guarantees and security interests now that they have been assigned to the RCC than it was when the loans, mortgages, guarantees and security interests were held by LTCB.

The RCC did not voluntarily "interject" itself into an action in the Guam Superior Court that otherwise would not be binding on it. On the contrary, pursuant to Rule 25(c) of the Federal Rules of Civil Procedure and Guam Rules of Civil Procedure, the RCC will be bound by the judgment in this action regardless of whether it is joined as a defendant. Joinder, therefore, merely allowed the RCC to defend its interests in the action in its own name and to assert its rights, including the right to remove the action to federal court pursuant to 28 U.S.C. Section 1441(d). Such removal is fully consistent with – and indeed required by the statutory purpose of the FSIA to provide foreign sovereigns with a federal forum in which to defend their interests. *Verlinden*, 461 U.S. at 484.

III. CONCLUSION

Keeping in mind that Congress intended "agency or instrumentality" in the FSIA to be read broadly, *Gates*, 54

F.3d at 1460, the Court finds that the RCC is precisely the type of party which Congress intended the FSIA to protect.

EIE Guam only disputes whether the RCC satisfies one of the alternative requirements of 28 U.S.C. Section 1603(b)(2). In this regard, EIE Guam's sole – and clearly erroneous – argument is the fact that the RCC is not owned by a foreign state but is 100% owned by another "agency or instrumentality" of the Japanese government. EIE Guam's argument ignores the plain language of Section 1603(b)(2). Therefore, plaintiff's Motion for Remand is DENIED in all respects.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the above-captioned case is set for a scheduling conference on Tuesday, July 17, 2000 at 9:00 a.m. A Proposed Scheduling Order shall be filed by the plaintiff no later than the close of business on Monday, July 10, 2000.

Dated: June 7, 2000

/s/ John S. Unpingco
JOHN S. UNPINGCO
District Judge

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

EIE GUAM CORPORATION, Plaintiff, vs. THE LONG-TERM CREDIT BANK OF JAPAN LTD.; THE RESOLUTION and COLLECTION CORPORATION, Defendants.	Civil Case No. 00-00009 **ORDER** (Filed Sep. 1, 2000)
AND RELATED COUNTERCLAIMS	

The Court is being asked to certify its June 7, 2000 Order, which denied EIE Guam's Motion for Remand.

PROCEDURAL HISTORY:

On March 15, 2000, EIE Guam brought a motion to remand this case to the Superior Court of Guam and to levy fees and costs incurred against the Long-Term Credit Bank of Japan, Ltd. ("LTCB"), the Resolution and Collection Corporation ("RCC") and their counsel, as a result of a bad faith removal. In its June 7, 2000 Order, this Court denied EIE Guam's motion in all respects.

DECISION:

An order denying remand is "obviously . . . not final and immediately appealable" as of right. *Chicago, R.I. & P.R. Co. Stude*, 346 U.S. 574, 578, 74 S.Ct. 290, 98 L.Ed.

317 (1954). Only in rare and exceptional circumstances has Congress' authorized interlocutory appeals. *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1027 (9th Cir. 1982). The party seeking certification of an interlocutory appeal "has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).

28 U.S.C. section 1292(b) sets forth three separate criteria for interlocutory review of an order: (1) the order must involve "a controlling question of law"; (2) "substantial ground for difference of opinion" must exist on that controlling issue of law; and (3) the court must determine that "an immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. Section 1292(b); *In re Cement Antitrust Litig.*, 673 F.2d at 1026. These criteria are "very strict" and present a "high standard." *Syufy Enters v. American Multi-Cinema, Inc.*, 694 F. Supp. 725, 729 (N.D. Cal. 1988). All three criteria must be met; the Ninth Circuit has expressly rejected the approach of collapsing the three separate requirements into a unitary requirement. *In re Cement Antitrust Litig.*, 673 F.2d at 1027.

Although orders denying remand occasionally have been certified pursuant to Section 1292(b), nothing in Section 1292(b) or the relevant case law suggests that the Court should routinely certify an order denying remand for immediate appeal. If Congress had intended for denial of remand orders to be immediately appealable as a routine matter, Congress would have expressly made such orders immediately appealable rather than reviewable

only in the exceptional case meeting the requirements of Section 1292(b). In a case involving denial of a motion for remand, the Supreme Court held:

> Routine resort to Section 1292(b) requests would hardly comport with Congress' design to reserve interlocutory review for "exceptional" cases while generally retaining for the federal courts a firm final judgment rule. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

1. INTERLOCUTORY REVIEW OF THE COURT'S SUBJECT MATTER JURISDICTION IS NOT WARRANTED IN THIS CASE

EIE Guam tries to characterize the purported "controlling issue of law" upon which it seeks interlocutory review as "subject matter jurisdiction." In this case, subject matter jurisdiction is predicated upon the Court's finding that the RCC is an "organ" of the Japanese government within the meaning of the FSIA and 28 U.S.C. Section 1330(a), which confers original federal jurisdiction over actions against organs of foreign states.

As to the RCC's status as an organ of the Japanese government, EIE Guam has pointed to no "controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. Section 1292(b). Instead, the issue of whether the RCC is an "organ" of a foreign state within the meaning of the FSIA involves application of established law to the facts of this particular case. When the applicable law is clear, such fact based determinations are not appropriate for interlocutory appeal. *Brown v. City of Oneonta*, 858 F.Supp. 340, 349 (N.D.N.Y. 1994).

2. THE RCC'S REMOVAL IS NOT SUBJECT TO INTERLOCUTORY REVIEW

Distinct from the issue of subject matter jurisdiction, EIE Guam raises questions related to the propriety of the RCC's removal of this action pursuant to 28 U.S.C. Section 1441(d). In essence, EIE Guam argues that even if the RCC is an organ of a foreign state the RCC's removal was improper because the RCC had voluntarily joined as a defendant and because EIE Guam believes that the RCC should be realigned as a plaintiff. Apart from general references to "subject matter jurisdiction," such questions relating to the propriety of the RCC's removal are the only other issues specifically mentioned in EIE Guam's motion to certify for which EIE Guam asserts there is substantial ground for difference of opinion. The Court holds that any issue relating to the propriety of the RCC's removal, however, fails to satisfy the three separate criteria of Section 1292(b) for interlocutory appeal.

In order to satisfy Section 1292(b)'s requirement that an order involve a "controlling question of law," the party seeking interlocutory review must show "that resolution of the issue on appeal could materially affect the outcome of the litigation" on appeal. *In re Cement Antitrust Litig.*, 673 F.2d at 1026. EIE Guam's primary argument is that an eventual appeal in this action "is virtually a foregone conclusion" and that, if the Ninth Circuit eventually decides that removal was improper, the entire proceedings in federal court "will have been rendered a nullity . . . at a tremendous cost to the parties as well as to the Court." EIE Guam Mem. at 12.

When, as here, subject matter jurisdiction in the District Court is proper under the FSIA, a hypothetical

possibility that the Ninth Circuit might later decide that the RCC should not have been allowed to remove – for reasons other than subject matter jurisdiction – will not render the proceedings in this Court a nullity. A judgment will only be vacated when, despite a district court's threshold denial of a motion to remand, a defect relating to subject matter jurisdiction remains uncured after trial. *Caterpiller*, 519 U.S. at 76-77. Notwithstanding alleged defects in removal, if subject matter jurisdiction is proper at the time judgment is rendered, the judgment will not be vacated. *Id.*

Regarding the realignment issue, EIE Guam contends that "there is an absence of Ninth Circuit case law on the question of whether realignment of diversity of citizenship purposes applies in the context of the Foreign Sovereign Immunities Act." EIE Guam Mem. at 9. "[T]he mere fact that there is a lack of authority on a disputed issue does not necessarily establish some substantial ground for a difference of opinion under the statute." *FDIC v. First Nat'l Bank*, 604 F.Supp. 616, 620 (E.D. Wis. 1985). Furthermore, the court holds that review of this issue would not be outcome determinative. Thus, the issue could not materially affect the outcome of the litigation.

The parties in this case have been embroiled in contentious litigation since 1995. In the Court's opinion granting a motion to certify an interlocutory appeal will simply further delay proceedings in a case which is ripe for trial. As evidenced by both parties recent motion filings, this case is in dire need of strong case management. This Court is in the best position to provide case management and will ensure that the case proceeds to its ultimate resolution in an expeditious manner. Thus, an interlocutory appeal would not, under any circumstances,

"materially advance the ultimate termination of the litigation" as required under 28 U.S.C. Section 1292(b). To the contrary, an interlocutory appeal probably would substantially delay the ultimate resolution of this case.

Therefore, plaintiff's motion is DENIED in all respects.

IT IS SO ORDERED.

Dated: September 1, 2000

/s/ John S. Unpingco
JOHN S. UNPINGCO
District Judge

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

EIE GUAM CORPORATION, Plaintiff, vs. THE LONG-TERM CREDIT BANK OF JAPAN, LTD., et al., Defendants. AND RELATED COUNTERCLAIMS	CIVIL CASE NO. 00-00009 MEMORANDUM ORDER (Filed Dec. 12, 2000)

This case comes before the Court on Plaintiff's Motion for Reconsideration of the Court's November 13, 2000 ruling that this entire case be tried in a bench trial.

PROCEDURAL HISTORY

On November 1, 2000, the Court ruled that it would adopt Stage 1 of the trial plan submitted by Defendant's LTCB and RCC. This was then seen by the Court as the simplest and fastest way to try the dispositive core issues in the case. As RCC had purchased all of LTCB's interest in the Guam Hyatt hotel (and stood to lose it all if it did not prevail), and as the Foreign Sovereign Immunities Act ("FSIA") and FSIA case law all uniformly enunciated the foreign sovereign's right to a nonjury trial, the Court held that the entire case would be tried by bench trial.

Under Defendant's Stage 1 trial plan, the Court, after the nonjury trial of this stage, would certify the appealability of its decision to the Ninth Circuit. Unexpectedly,

the Plaintiff (through the filing of its documentary evidence) chose not to limit its defense in Stage 1 to contract formation issues but rather chose to present its entire defense (which is also all its claims). The Defendants filed an Ex Parte motion seeking to limit Plaintiff's defense to contract formation issues. The Plaintiff countered by filing a Motion for Reconsideration of the Court's ruling that the entire case be tried by judge alone.

At the November 8th hearing on the Ex Parte Motion and the Motion for Reconsideration, the Court refused to limit the plaintiff's presentation to contract formation issues only. The Court so held because it did not want to deprive Plaintiff of the opportunity to present its best defense, and, the Forbearance Agreement contained a potent release provision which if held to be valid could eliminate Plaintiff's entire case. Defendants, in reliance on the Court's direction to try the case in "bite-size pieces" candidly informed the Court that they would not be ready to go to trial on the scheduled trial date as their Stage 1 presentation was not intended to deal with Plaintiff's entire defense.

Accordingly, the Court announced that it would reconsider how the case was to be tried and that it would announce its decision on November 13, 2000. With this, Plaintiff withdrew their Motion for Reconsideration.

On November 13, 2000, the Court ruled that Plaintiff will present its case first because it has the burden of proof. The trial will be nonjury as a parallel jury and bench trial will not be allowed for three reasons. First, as the issues to be tried by judge and jury are identical or inextricably intertwined, the possibility of conflicting

verdicts is quite probable. The Court did not wish its decision to be merely advisory or held to be such.

Second, RCC is the real party at risk here. RCC will lose all of its rights if it loses. LTCB's liability exposure is minimal. As RCC is a foreign sovereign, the FSIA mandates a nonjury trial. And, third, the sole source of removal of this case and the source of this Court's jurisdiction over this case is the FSIA. The FSIA unquestionably requires a nonjury trial for a foreign sovereign defendant.

On November 22, 2000, Plaintiff re-filed its Motion for Reconsideration of the Court's November 13th Ruling. The motion was heard on November 29, 2000. This Order memorializes the Court's ruling on the Motion for Reconsideration.

ANALYSIS

This case had been in litigation for five years prior to its removal to this Court. The case presents issues with novel twists. The most novel issue is that it is an FSIA case where the Plaintiff's causes of actions are its defenses to Defendants' counterclaims. Similarly, Defendants' defenses are their counterclaims against the Plaintiff. Thus, if the FSIA mandates a bench trial when a foreign sovereign is a defendant, then once that case is tried, there should not be any reason for a jury trial on the counterclaims where the foreign sovereign is the plaintiff. But,

does this run afoul of *Beacon Theatres, Inc. vs. Westover*,[1] 359 U.S. 500, 79 S. Ct. 948 (1959)? Or, is the approach suggested in *Allendale Mutual Insurance Co. vs. Bull Data Systems, Inc.*,[2] 1995 WL 5895 (N.D. Ill.) the appropriate approach?

Next, does RCC's purchase of LTCB's assets, which are at issue in this case mean that RCC totally "steps into the shoes of its predecessor in interest" with respect to those assets and any liabilities incurred in the securing of those assets by both LTCB and RCC? Or, does RCC's purchase of those assets only subject RCC to any liabilities that may arise after its purchase? Does the FSIA nonjury trial right trump EIEG's Seventh Amendment jury trial right with respect to its claims against LTCB because those claims are identical to EIEG's claims against RCC?

Finally, at the heart of the dispute in this case is the enforceability of loan agreements, guarantees and a forbearance agreement. These contracts are assets that were sold by LTCB to RCC. Thus, the party which stands to suffer the greatest loss should it not prevail is RCC, an

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[1] The Supreme Court held that the right to a jury trial is a constitutional one which trial courts should seek to preserve. Accordingly, the Supreme Court concluded that when legal and equitable claims arise from the same set of facts, the legal claims should be tried first to a jury, and its decisions as to the facts should control the court's decision of the equitable claims.

[2] The *Allendale Mutual* court held that the FSIA did not apply to claims brought by a foreign state. Accordingly, the court ruled that since the counterclaims brought by the foreign state defendants were identical in nature to the relief sought by the plaintiff against the defendants, a jury's resolution of the factual disputes concerning the counterclaims extinguished the need for a bench trial on the complaint.

instrumentality of a foreign sovereign. Does this factor add greater weight to the demand by RCC for a non-jury trial?

A. EIEG's claims against LTCB and RCC's counterclaim against EIEG require a jury trial.

Under the Seventh Amendment EIEG has the right to a jury trial on its legal claims against the LTCB. As LTCB is not an instrumentality of a foreign government, then under the *Tull*[3] analysis a jury trial is warranted. The Defendants also conceded this point at oral argument when they expressly stated that under the terms of the Assignment Agreement between Defendants LTCB and RCC, the latter received only the assets. Defendant RCC expressly disavowed purchasing or accepting any of LTCB's liabilities. RCC took its assignment subject to any defenses that may exist against LTCB's rights. A review of the Assignment Agreement confirms the assignment of assets only. RCC does not entirely "step into the shoes" of

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[3] *Tull v. United States,* 481 U.S. 412, 107 S. Ct. 1831 (1987). In *Tull*, the Supreme Court established a standard for determining whether the right to a jury trial existed for legal actions created by statute:

> To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First we compare the statutory action to 18th-century actions brought in the Courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. 481 U.S. at 415, 107 S. Ct. at 1834 (citations omitted).

its assignor. Thus, the damages that Plaintiff may recover from LTCB should the former prevail are not minimal.

In this case, the Court must empanel a jury. If even one issue in a case requires a jury trial, there is no choice. *Dairy Queen v. Wood, Inc.,* 369 U.S. 469, 82 S. Ct. 894 (1962). Moreover, the jury trial must occur prior to or simultaneously with any bench trial. *Beacon Theaters,* 359 U.S. 511, 79 S. Ct. at 957. Any attempt to subordinate jury claims by trying them after bench issues is constitutionally impermissible. *Id.* Finally, Ninth Circuit precedent requires a parallel jury trial as to claims against a foreign sovereign's co-defendants (in an FSIA case) where there is an independent basis for those claims. *Gould v Aerospatiale Helicopter Corp.,* 40 F.3d 1033 (9th Cir. 1994).

With respect to Defendant's claims against Plaintiff, those clearly deserve and require a jury trial. Under the FSIA, a nonjury trial is mandated only where the foreign sovereign is a defendant. Thus, a jury trial must be held on EIEG's legal claims against LTCB and on RCC's counterclaims against EIEG. No issue preclusion can occur within the same case where a judge decides issues that must also be decided by the jury. *Material Supply Int'l, Inc. v. Sunmatch Indus. Co.,* 146 F.3d 983, 988-89 (D.C. Cir. 1998). The Constitution and controlling precedent require this court to empanel a jury for the above-mentioned claims. To do otherwise violates the Seventh Amendment right and *Gould.*

B. The trial of EIEG's claims against RCC must be nonjury.

The FSIA mandates a nonjury trial where the Defendant is a foreign sovereign. This is an inescapable conclusion.

Plaintiff urges the Court to follow the *Allendale* case. The difficulty with *Allendale* is that the conclusion can just as easily be the converse of what was decided in *Allendale*. A bench trial on the validity of the agreements can likewise preclude a jury trial on the same issue. And, in the latter scenario, the provisions of the FSIA would have been followed.

Both the Seventh Amendment right to a jury trial and the FSIA mandate of a nonjury trial are inviolate. Neither should be used to preclude the other especially when the viable solution of a parallel jury and a nonjury exists. *See Gould, Matthews v. CTI Container Transport Int'l Inc.*[4] and *Bank of China v. Chan.*[5] This court refuses to substitute its discretion to eliminate one of these two competing rights where each right is mandated by a legitimate source of authority. In addition, the FSIA as interpreted by two courts requires a court – on its own – to decide the claims against the foreign sovereign in a nonjury trial, regardless of whether these claims involve common issues of fact with claims to be tried by a jury. *Chan* and *Matthews* clearly apply to the facts of the instant case. Finally, parallel trials would promote judicial economy. In the instant case, the same witnesses and the same evidence would be used for the jury and nonjury trials.

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[4] 871 F.2d 270 (2nd Cir. 1989).

[5] 1992 WL 298002 (S.D.N.Y.).

C. Although the jury and bench trials must be held simultaneously, the jury's verdict does not bind the Court in the bench trial or vice versa.

The Court has found no FSIA case which explicitly discusses the preclusive effect of a court verdict on issues triable by a jury. It is doubtful that such preclusive effect can logically be held to exist in view of the holdings in *Matthews* and *Chan*. *See also Sunmatch Indus.* and *Wichoff vs. GTE Directories Corp.* 61 F.3d 508, 595-596 (8th Cir. 1995). *Matthews* and *Chan* both held that in an FSIA action, the jury's findings on non-FSIA claims do not bind the court in deciding the claims against the foreign sovereign. Thus, the Court's foremost concern with the holding of a parallel jury/bench trial was resolved.[6]

In *Matthews,* plaintiff brought a negligence action against multiple defendants for personal injuries arising out of an automobile accident. One defendant was a foreign sovereign under the FSIA. The facts and issues on the negligence claim against the various defendants were intertwined, and the court held a bench trial against the foreign sovereign and a jury trial against the other defendants. "[T]he district judge made her own findings of fact

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[6] Based on the claims and defenses presented in the pleadings, the Court anticipates that this case will involve a number of corporate law, corporate financing and equity concepts, and probably forensic accounting concepts which the non-legal trained jurors, and even lawyers and judges, may have difficulties comprehending. Added to this is the fact that many witnesses are Japanese and that the corporate financing concepts to be presented may have to be from both a U.S. and Japanese analytical framework. Finally, there may be difficulties in translation from Japanese to English that may need to be resolved.

and conclusions of law, which differed in significant respects from the jury verdict." 871 F.2d at 274. *Contrary to the jury's verdict, the judge did not find one of the defendants negligent or partially responsible for the accident.* On an indemnity claim, another defendant asserted that "inconsistent verdicts based on the same evidence at the same trial are logically impossible, and the court must, as a matter of law, follow the verdict of the jury." *Id.* at 279. In rejecting this argument, the court noted that the FSIA "expressly requires that the 'action be tried to the court without jury.'" *Id.* (citation omitted). *Thereafter, the court held that the FSIA "assures the foreign sovereign the benefit of a court's fact-finding even where such fact-finding differs from the fact-finding of a jury on the same issue in the same trial." Id.* (emphasis added).

In *Chan,* an organ of the people's Republic of China sued defendant on a guaranty. The FSIA applied to defendant's counterclaims against the foreign sovereign. In response to the foreign sovereign's claims, defendant asserted affirmative defenses of commercial unreasonableness and bad faith. *Defendant's counterclaims were "based on essentially the same facts that allegedly established his affirmative defenses." Chan,* 1992 WL 298002 at *1. Defendant therefore argued that he was entitled to a jury trial on his affirmative defenses and that the jury's fact-finding as to those defenses would bind the court in deciding the counterclaims governed by the FSIA. *The court disagreed, holding that the court would decide the counterclaims against the foreign sovereign and that the jury would try defendant's affirmative defenses. In particular, the court held that* ***"the jury's finding will not bind the Court in deciding the defendant's counterclaims."*** *Id.* at *2 (emphasis added).

D. A parallel jury and nonjury trial would not deprive RCC of its right to a true bench trial.

A parallel jury/bench trial will not deprive RCC of its right to a true bench trial. In *Houston v. Murmansk Shipping Co.,*[7] the trial judge repeatedly told both parties how he would have handled various parts of the case had the jury not been present. A judge can receive evidence or even pursue pointed cross-examination without prejudicing the jury, for example, simply by excusing the jury from the room and then proceeding with his examination. Counsel can request that portions of their respective cases be presented to the judge alone. The problem evident in *Murmansk* can readily be remedied.

In light of the foregoing, there will be a parallel jury/bench trial in the instant case. The Defendants RCC and LTCB will present their case first as this would be easier for the jury to follow. EIEG will present its entire defense which is also its "offense." Then EIEI will present its case. The burdens of proof to be borne by each side remains unchanged. Plaintiff has the burden of proof on their claims and defendants likewise on their counterclaims.

Finally, at the chambers conference held immediately after this hearing, the trial date was set for January 8, 2001. Counsel and the Court will be meeting several times prior to the trial to resolve evidentiary objections and other pre-trial matters.

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[7] 667 F.2d 1151 (4th Cir. 1982).

SO ORDERED this 12th day of December, 2000.

/s/ John S. Unpingco
JOHN S. UNPINGCO
District Judge

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

EIE GUAM CORPORATION, Plaintiff, vs. THE LONG-TERM CREDIT BANK OF JAPAN LTD. THE RESOLUTION AND COLLECTION CORPORATION, Defendants.	Civil Case No. 00-00009 **ORDER** (Filed Feb. 5, 2001)
AND RELATED COUNTERCLAIMS	

The case comes before the Court on the defendant's request to apply Japanese law when deciding the issue of whether the Bank owed any fiduciary duty to EIE International ("EIEI").

FACTS

On March 8, 1999, the Superior Court of Guam held a hearing on the Long-Term Credit Bank of Japan's ("LTCB") motion for summary judgment. Counsel for LTCB, during her oral argument in support of the motion, stated that with respect to LTCB's conduct toward EIE Guam ("EIEG") Japanese law may apply. The Superior Court denied the motion in a Decision and Order dated March 18, 1999. Despite LTCB's argument at the hearing, the Court did not apply Japanese law to any of EIEG's claims.

LTCB again argued that Japanese law applied when LTCB opposed EIEG's motion for preliminary injunction to prevent LTCB from foreclosing on its mortgage and selling the Hotel. In its opposition to the motion, LTCB argued at length that Japanese law should govern EIEG's breach of fiduciary duty claim.

The Superior Court then granted EIEG's motion for preliminary injunction in Decision and Order dated June 14, 1999. The Court applied U.S. law, not Japanese law, to EIEG's claims.

DECISION

A. NO CHOICE OF LAW QUESTION IS PRESENT

LTCB/RCC allege that EIEG's breach of fiduciary duty claim against the LTCB is dependent on showing that LTCB owed EIEI a fiduciary duty. This misstates EIEG's fiduciary duty claim. EIEG's breach of fiduciary duty claim requires showing LTCB's control over EIEG, control which it has exercised both directly, and indirectly through EIEI. This control of EIEG gave rise to LTCB's fiduciary duty to EIEG. *Wright v. Heizer Corp.*, 560 F.2d 236 (7th Cir. 1977) (breach of fiduciary duty where lender in control of borrower does not act in borrower's best interest).

The fiduciary duty claim arises from the Construction Loan and Continuing Guarantees. These contracts were negotiated on EIE Guam's "behalf" by Shigeru Omozi, a secondee from LTCB to EIEI. LTCB personnel also negotiated and finalized the mortgages supporting these loans. After the transaction was complete, LTCB required EIEG's Japanese President Harunori Takahashi to sign

the mortgages and other lengthy legal documents, all of which were written in English. When the Forbearance Agreement was signed two years later, it was in the context of those allegedly self-dealing loans that have over-encumbered the Guam Hyatt and left EIEG under the absolute influence and control of LTCB. These facts, as established by detailed evidence, will attempt to show that LTCB owed EIEG a fiduciary duty. The adjudication of LTCB's legal duty to EIEI is not necessary to EIEG's claim.

B. THE SUPERIOR COURT FOUND GUAM LAW CONTROLLING

LTCB/RCC's motion is also flawed because it attempts to overturn the Superior Court's rulings that Guam law controls the fiduciary duty claim without any grounds for such reconsideration. After a case is removed from state court, "orders and other proceedings had in such action to its removal shall remain in full force and effect until dissolved or modified by the district court" 28 U.S.C. Section 1450. "Judicial economy is promoted by providing that proceedings had in state court shall have full force and effect in federal court, so that pleadings filed in state court, for example, need not be duplicated in federal court." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 435-436 (1974). The standard for review of interlocutory orders of a state court is the same as motions for reconsideration. *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1303-1304 (5th Cir. 1988).

C. GUAM LAW APPLIES UNDER CHOICE OF LAW PRINCIPLES

Even if choice of law principles are applied to the issue of LTCB's legal duty to EIEI, Japanese law has no more application to that issue than to any other part of this case. This case is about the validity and enforceability of contracts with Guam choice of law provisions in the context of an attempt to foreclose on Guam real property.

EIEG's breach of fiduciary duty claim is centered on control of the Guam Hyatt Hotel. EIEG brought this claim because of LTCB's attempt to foreclose on the mortgages related to the Construction Loan and Continuing Guarantees, contracts which breached LTCB's fiduciary duty to EIEG. Issues relating to the control of real property are always matters of local law. *Cummings v. Bollock*, 367 F.2d 182, 183 (9th Cir. 1966). On this ground alone, EIEG's breach of fiduciary duty claim is governed solely by Guam law.

However, conflict principles relating to contract law also support application of Guam law to the entirety of the breach of fiduciary duty. In any contract case, the law chosen by the parties should control. Restatement of Conflicts of Laws 2d Section 187. This covers all causes of action arising from or related to the contracts, including related tort claims. *Nedlloyed Lines v. B.V. v. Superior Court*, 834 P.2d 1148, 1154 (Cal. 1992).

Here the breach of fiduciary duty claim is first and foremost a claim to invalidate the various contracts encumbering the Guam Hyatt that LTCB allegedly forced EIEG to enter into during the control period. The contracts gave rise to the claim because they were unfair and self-dealing, and thereby illegitimately encumbered the

Guam Hyatt property, making the sale, expansion, or alternative financing of the Hotel impossible. Those contracts, the July 15, 1992 Construction Loan Agreement, the July 15, 1992 Continuing Guarantees, the July 15, 1992 Promissory Note, and the July 15, 1992 Mortgages and Security Agreement, all contain Guam choice of law provisions. The August 31, 1994 Forbearance Agreement, to which EIEI was a signatory, also includes a Guam choice of law provision.

RCC claims that the contractual relationships between EIEI and LTCB is controlled by Japanese law and therefore Japanese law should be applied in this case. However, as noted above, as applied to the issue of EIEG's claim for breach of fiduciary duty, this is demonstrably false.

First, the Forbearance Agreement Section 17.10 (Governing Law) states:

This agreement shall be governed by the laws of the Territory of Guam without giving effect to the principles of conflicts of laws thereof.

The other contract that is asserted against EIEI and EIEG in this case unquestionably provides that issues of "validity" or "perfection" are to be governed by the laws of a jurisdiction other than Japan. Joint Exhibit J49 at J14500 (June 23, 1993 Assignment and Security Agreement (Guam)) ("EIEI Security Agreement")) Section 18. Thus, the only two contracts asserted by LTCB against EIEI and EIEG, the Forbearance Agreement and the EIEI Security Agreement, establish the Guam law should control as to the central question raised by EIEG's breach of fiduciary duty claim, namely whether LTCB can enforce

it's security interest in the Guam Hyatt and other real and personal property.

Furthermore, even if tort principles were applied to LTCB's duty to EIEI, only Guam has a substantial interest in determining LTCB's duties in this case. Under Sections 6 and 145 of the Restatement of Conflicts of Laws, Guam has a much more significant relationship to all issues in this case related to LTCB's duties. The injury underlying LTCB's breach of duty occurred in Guam, when LTCB fraudulently gained an interest in the Guam Hyatt. The relationship between LTCB and EIEI regarding EIEG was centered in Guam because LTCB used its control of EIEI to invade EIEG and gain property rights in EIEG. Lastly, the justifiable expectations of the parties favor application of Guam law. LTCB's lawyers inserted Guam choice of law provisions into the contracts and made LTCB aware that its conduct was subject to Guam law. See Jampel Deposition at 74:15-75:6; Futami Dep. 148:24-149:21. Moreover, documents found during discovery chronicle the extensive concerns of LTCB regarding its liability under U.S. law for the torts it was committing on U.S. soil. LTCB knew the risk it was taking, and it cannot now insulate itself from liability simply because its allegedly controlled EIEI as part of its means for perpetrating a tort against EIEG regarding Guam property.

Therefore, the defendants' request for a hearing on the issue of choice of law is DENIED. All issues in this case will be adjudicated according to the laws of Guam.

IT IS SO ORDERED

Dated: February 5, 2001

/s/ JOHN S. UNPINGCO
JOHN S. UNPINGCO
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EIE GUAM CORPORATION, a Guam corporation, Plaintiff-Appellant, v. THE LONG TERM CREDIT BANK OF JAPAN, LTD., now known as THE SHINSEI BANK, LTD., a Japanese corporation; and THE RESOLUTION AND COLLECTION CORPORATION, a Japanese corporation, Defendants-Appellees.	No. 02-16214 D.C. No. CV-00-00009-ER ORDER (Filed May 29, 2003)

EIE GUAM CORPORATION, a Guam corporation, Plaintiff-Appellee, v. THE LONG TERM CREDIT BANK OF JAPAN, LTD., now known as THE SHINSEI BANK, LTD., a Japanese corporation; and THE RESOLUTION AND COLLECTION CORPORATION, a Japanese corporation, Defendants-Appellants.	No. 02-16259 D.C. No. CV-00-00009-ER

Before: HUG, ALARCON, and GRABER, Circuit Judges.

Judges Alarcon and Graber have voted to deny the petition for rehearing, and Judge Hug has voted to grant the petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc and Judge Alarcon has so recommended. Judge Hug has recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

This court's stay is dissolved upon issuance of the mandate.

APPENDIX D

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, § 1602 *et seq.*, provides:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

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§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property

may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

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§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or

act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

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§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

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§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States

in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –

> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the

time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages

sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action

brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a) –

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.

(1) In general.

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request,

demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies

in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rule 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

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§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting

from such death which were incurred by the persons for whose benefit the action was brought.

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§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim –

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

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§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other

agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state –

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made –

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the

complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

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§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

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§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7),

regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the

elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries –

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. The President may waive any provision of paragraph (1) in the interest of national security.

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§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International

Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if –

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

The general federal removal statute, 28 U.S.C. § 1441, provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the

place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * *

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

Supreme Court, U.S.
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In The
Supreme Court of the United States

EIE GUAM CORPORATION,

Petitioner,

v.

THE LONG-TERM CREDIT BANK OF JAPAN, LTD., and THE RESOLUTION AND COLLECTION CORPORATION

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (FSIA) grants federal courts subject matter jurisdiction over, and authorizes removal of, actions against a "foreign state." 28 U.S.C. §§ 1330(a) and 1441(d). A foreign state is defined to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The FSIA's express terms provide that an agency or instrumentality includes a corporation if it is an organ of a foreign state, regardless of its ownership. Specifically, the FSIA defines an "agency or instrumentality of a foreign state" as, *inter alia*, any entity "(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state . . . , ***or*** a majority of whose shares or other ownership interest is owned by a foreign state . . . , and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(b) (emphasis added).

The questions presented are:

1. Whether, notwithstanding the use of the disjunctive "or" in the FSIA, a corporate entity which is an organ under the first prong of 28 U.S.C. § 1603(b)(2), must also satisfy the separate, alternative "ownership" prong of 28 U.S.C. § 1603(b)(2), the alternative addressed in *Dole Food Co. v. Patrickson*, 538 U.S. ___, 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003), to be an agency or instrumentality of a foreign state.

2. Whether the FSIA's express language authorizing removal of "any civil action brought in a State court against a foreign state," 28 U.S.C. § 1441(d), should be limited to exclude removal by a foreign sovereign which joins as a defendant pursuant to stipulation and court order.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent The Resolution and Collection Corporation (RCC) is a corporate entity organized under the laws of Japan, and is an organ of the government of Japan. The RCC is 100% owned by The Deposit Insurance Corporation of Japan, an agency and instrumentality of the Japanese government.[1] Respondent Shinsei Bank, Ltd., formerly known as The Long-Term Credit Bank of Japan, Ltd. (Bank), is a Japanese corporation and has no parent corporation. The only shareholder that holds more than 10% of the Bank's common stock is New LTCB Partners C.V.

[1] Because the RCC is an organ of the Japanese government, this information is merely submitted for the Court's convenience.

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EIE Guam Corp. v. The Long-Term Credit Bank of Japan, 322 F.3d 635 (9th Cir. 2003) ..... *passim*

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Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28 (2002) 21

Tenn. v. Davis, 100 U.S. 257 (1879) 20

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28 U.S.C. § 1603(b)(1) 2

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OTHER AUTHORITIES

Gabe Shawn Varges, *Defining a Sovereign for Immunity Purposes*, 26 Harv. Int'l L. J. (1985) 19

Gary B. Born & David Westin, *International Civil Litigation in United States Courts*, 459 (2d ed. 1992) 18

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610 .....*passim*

Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, reprinted in F.V. García-Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974) 18

Restatement (Second) of Foreign Relations Law of the United States (1965) 18, 20

Third Report on State Responsibility, U.N. Doc. A/CN. 4/246 & Add. 1-3, *reprinted in* [1971] 2 Y.B. Int'l. L. Comm'n (pt. 1) 199, U.N. Doc. A/CN.4/SER.A/1971 18

William C. Hoffman, *The Separate Entity Rule in International Perspective*, 65 Tul. L. Rev. 535 (1991) 19

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3721 (1998) 20

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STATEMENT OF THE CASE

A. Statutory Framework

The Foreign Sovereign Immunities Act of 1976 (FSIA) establishes comprehensive statutory standards for actions against a foreign state or its agencies and instrumentalities. H.R. Rep. No. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). It "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." H.R. Rep. No. 94-1487, at 12. The FSIA "preempt[s] any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." *Id.* The FSIA governs "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States." *Id.* at 6.

The FSIA must be applied by the courts in every action against a foreign state. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). The FSIA defines a "foreign state" to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Section 1603(b) defines "[a]n agency or instrumentality of a foreign state" as meaning "any entity – "

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, ***or*** a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

> (3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b)(1), (2) and (3) (emphasis added).

Petitioner EIE Guam Corporation (EIEG) here in effect contends that "or" means "and." In *Dole Food Co. v. Patrickson*, 538 U.S. __, 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003), this Court considered only one of the two alternative prongs of Section 1603(b)(2). In particular, *Patrickson* addressed the second prong of Section 1603(b)(2), namely, whether "a corporation is an 'agency or instrumentality' if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation." *Dole Food Co. v. Patrickson*, 536 U.S. 956 (2002). The first prong of Section 1603(b)(2) – whether the removing party is an "organ of a foreign state or political subdivision thereof" – was ***not*** before this Court nor was it addressed.[2]

Under the FSIA, an agency or instrumentality of a foreign state which is a defendant in "any action brought in a State court" may remove the action to federal court. 28 U.S.C. § 1441(d). "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts. . . . " *Verlinden*, 461 U.S. at 497. The House Report for the FSIA emphasizes: "In view of the potential sensitivity of actions against

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[2] Various briefs in *Patrickson* stressed that the separate "organ" prong was not at issue. *E.g.*, Brief of the United States (May 31, 2002) at 12 n.5; *see infra* at 16-17.

foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts." H.R. Rep. No. 94-1487, at 32. In light of the unusually strong preference "that actions involving foreign states be tried in federal courts," the customary limitations on removal in diversity cases – such as timing, amount in controversy, and joinder of parties – are inapplicable in FSIA cases. *Id.*; *see* 28 U.S.C. § 1441(d).

B. Factual and Procedural Background

This appeal arises from an interlocutory order.[3] On February 6, 2001, the parties signed a Term Sheet for Settlement, but the settlement did not close by the August 9, 2001 deadline. The Ninth Circuit held that material breaches of the Term Sheet precluded specific performance of the settlement. The court required a return to trial, remanding the case to the district court. Thus, although this action was filed in 1995, no trial has occurred and no judgment has been entered.

1. This action is factually and procedurally complex. EIEG owes The Long-Term Credit Bank of Japan, Ltd. (the Bank)[4] hundreds of millions of dollars in connection with the development and construction of a hotel on Guam. On August 2, 1995, EIEG sued the Bank in Guam

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[3] Indeed, it is EIEG's second petition for certiorari prior to trial. *See EIE Guam Corp. v. Supreme Court of Guam*, 191 F.3d 1123 (9th Cir. 1999), *cert. denied*, 528 U.S. 1137 (2000).

[4] The Bank has changed its name to Shinsei Bank, Ltd.

Superior Court to avoid its debt, alleging a variety of common law theories. The Bank filed counterclaims seeking to recover the money owed by EIEG.

Written financing documents reflect the hundreds of millions of dollars EIEG owes to the Bank. These documents include a July 1992 written construction loan agreement executed by EIEG, pursuant to which the Bank directly loaned $100.3 million to EIEG for the construction of the hotel, and three July 1992 guaranties executed by EIEG pursuant to which EIEG guaranteed certain debt owed by EIEG's then corporate parent, EIE International Corporation (EIEI), to the Bank. (ER 635-36, ER 1076, SER 12, SER 15.) These guaranties acknowledged that the Bank previously lent funds to EIEI which EIEI advanced to EIEG for the hotel. (ER 322, ER 373, ER 422, ER 837-38, SER 13.) EIEG's records confirm that the Bank lent most of the money to construct the hotel. (ER 730, SER 247, SER 250-51.)

In July 1994, EIEG defaulted and asked the Bank to forbear on exercising its remedies while EIEG and EIEI tried to sell the hotel. The Bank, EIEG, and EIEI then entered into a Forbearance Agreement wherein EIEG confirmed the validity of the financing documents and generally released all claims against the Bank. (SER 17-19, ER 1670-89.)

In 1995, notwithstanding EIEG's general release in the Forbearance Agreement and after EIEG failed to sell the hotel, EIEG filed this lawsuit against the Bank and other lenders. (ER 11-13.) As the district court recognized, "[d]espite EIEG's judicial admission and the Guam Superior Court's finding that EIEG received at least $170 million in loan funds, EIEG has not made any interest or

other payments to the Bank or the RCC since 1995." (ER 1707.)

2. On October 16, 1998, in response to extreme financial difficulties experienced by a number of Japanese financial institutions including the Bank, the Japanese Diet enacted "*Kinyu Kinou no Saisei no tameno Kinkyu Sochi ni kansuru Houritsu*" (in English, "The Law Concerning Emergency Measures for the Reconstruction of the Function of the Financial System") (Financial Reconstruction Law). The purpose of this law is to stabilize and revitalize the ailing Japanese financial system and provide emergency measures against the problems arising out of the collapse of financial institutions. Financial Reconstruction Law, Art. 1. This law authorizes the Financial Reconstruction Commission (FRC), an agency or instrumentality of the Japanese government (SER 187), to place a failed bank under "Special Public Management" (*tokubetsu kouteki kanri)*. The Financial Reconstruction Law empowers the Deposit Insurance Corporation of Japan (DICJ) – a Japanese government agency analogous to the Federal Deposit Insurance Corporation in the United States[5] – to purchase non-performing assets from banks under Special Public Management. In October 1998, the Bank became a bank under Special Public Management pursuant to the Financial Reconstruction Law. At the same time, the DICJ acquired all of the issued shares of stock of LTCB. (ER 821.)

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[5] The district court found that EIEG did not dispute that the DICJ "is an 'agency or instrumentality' of the Japanese government." (ER 999.) EIEG did not challenge this finding on appeal.

3. On April 1, 1999, the Japanese government created the RCC, as a wholly-owned subsidiary of the DICJ, to carry out Japanese national policy relating to revitalization of the Japanese financial system. *Tokutei Jutaku Kinyu Senmon Kaisha no Saiken Saimu no Shori no Sokushin tou ni kansuru Tokubetsu Sochi Hou* (Jusen Law), Art. 3.1; Supplementary Provisions of *Yokin Hoken Hou* (Deposit Insurance Law), Art. 7.1. The RCC is an agency or instrumentality of the Japanese government analogous to the Resolution Trust Corporation (RTC) in the United States. (ER 821-22.) Just as the RTC acquired non-performing loans from failed financial institutions in the United States and collected or otherwise disposed of such loans, the RCC performs a similar function in Japan. Paragraph 2 of Article 53.1 of the Financial Reconstruction Law authorized the DICJ to entrust purchases of non-performing loans to the RCC. (ER 820-822.)

After the Japanese government nationalized the Bank and created the RCC, the Bank transferred the loans, mortgages, and other financing agreements and security at issue in this case (along with many other non-performing loans) to the RCC pursuant to the Japanese Financial Reconstruction Law (Article 72) and the Deposit Insurance Law (Article 64) and its Supplementary Provisions (Article 10.1). (SER 186.) The DICJ determined the terms and conditions of the asset purchase agreement under the supervision of the Financial Reconstruction Commission. (SER 187.) The Ninth Circuit recognized the RCC's unique charter: "[T]he RCC took on that interest pursuant to the policies of the government of Japan, and any obligations arising from a judgment in EIEG's favor would be borne by the government and taxpayers of Japan." 322 F.3d at 646.

4. On March 3, 2000, with notice that the RCC was an agency or instrumentality of the Japanese government (ER 820-822, ER 826),[6] the parties stipulated to joinder of the RCC as a defendant and counterclaimant. (ER 901-06.) Not only did EIEG stipulate that the RCC join as a defendant (ER 902), but it also repeatedly argued that the preliminary injunction issued by the Guam Superior Court on June 14, 1999 enjoined the RCC from foreclosing on the mortgages on the hotel (SER 394), asserted that the RCC's claim for recovery was subject to set off of EIEG's claims against the Bank (ER 831 n.4), and argued that EIEG's declaratory relief claim directly related to the RCC's rights. Thus, upon the RCC's joinder, this became an action against a foreign state.

5. Immediately upon its joinder as a defendant, the RCC removed this action to federal court pursuant to the FSIA. (ER 901-06.) At the time the RCC was joined – and at the time of removal – the RCC was (and still is) an agency or instrumentality of the Japanese government.

6. EIEG moved to remand. The district court denied EIEG's motion, finding that the RCC is an organ of the Japanese government and a defendant against whom EIEG asserts claims.

7. On February 6, 2001, the parties executed a Term Sheet, which contemplated a settlement closing no later than August 9, 2001. Under the contemplated settlement, EIEG would pay the RCC $55 million and the parties were to exchange executed releases, dismissals, and other

[6] The Bank's joinder motion plainly stated that the RCC was an agency or instrumentality of the Japanese government. *Id.*

settlement documents. When the settlement failed to close by the August 9, 2001 deadline, the RCC/Bank sought an immediate return to trial as provided by the Term Sheet. EIEG filed a motion seeking to reform the Term Sheet, including a request that EIEG be given more time to pay the $55 million to the RCC. On May 13, 2002, the district court granted in part EIEG's motion, giving EIEG until November 25, 2002 to pay the settlement amount and interest.

8. EIEG appealed, and the RCC/Bank cross-appealed. The Ninth Circuit reversed the modification to, and enforcement of, the settlement, holding that mutual breaches had occurred rendering the settlement unenforceable. The Ninth Circuit remanded the case for trial.

9. The Ninth Circuit rejected EIEG's contentions on removal and jurisdiction. Specifically:

a. The RCC is not an "ordinary private business corporation" as EIEG asserts. It is an organ of the Japanese government. As the Ninth Circuit recognized, "the RCC's purpose 'is to carry out Japanese national policy related to the revitalization of the Japanese financial system'. . . . " 322 F.3d at 641. The Ninth Circuit specifically held that "[i]n view of the circumstances of its founding; its funding and financial connection to the government and taxpayers of Japan; its mission; and its purpose, . . . the RCC is an organ of the Japanese government. It is therefore a 'foreign state' within the meaning of the FSIA and is entitled to exercise the rights afforded foreign states under the FSIA." *Id.* at 642. As the Ninth Circuit concluded, "[t]he Japanese gover ıment created the RCC expressly to perform a public function." *Id.* at 640.

The Ninth Circuit based its decision on the district court's findings of fact, which the Ninth Circuit held were

"all supported in the record." *Id.* at 640-41. Specifically, the Ninth Circuit recognized:

- "[T]he RCC was created pursuant to several laws enacted by the Japanese Diet, namely Article 3.1 of *Tokeutei Jutaku Kinyu Senmon Kaisha no Saiken Saimu no Shori no Sokushin tou ni kansuru Tokubetsu Sochi Hou,* and supplementary provisions of *Yokin Hoken Hou*. . . ."

- "'[[T]]he Japanese government created the RCC to carry out Japanese national policy related to revitalization of the Japanese financial system.'"

- "'[[O]]ne of the primary functions of the RCC is to purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions, such as [the Bank], at the request of the Deposit Insurance Corporation of Japan, ('DICJ'), in accordance with Japanese Law.'"

- "[M]any of the RCC's activities are performed exclusively by the RCC and the DICJ [Deposit Insurance Corporation of Japan] and '[o]ther companies are not permitted to perform such activities even if they are in the loan collection business.'"

- "'[[T]]he RCC is funded by the Japanese government. . . .'"

- "'Japanese law provides that the [government-owned] DICJ will compensate the RCC for all losses at the end of every fiscal year.'"

- "'[T]he financial impact of any failure to collect the [EIEG] loans and guarantees assigned by [the Bank] to the RCC, or of a monetary damage award . . . in favor

[of] EIE Guam against the RCC, will ultimately be borne by the Japanese government and the Japanese taxpayers.'"

322 F.3d at 640. EIEG does not seek this Court's review of the lower court's determination that the RCC is an organ of the Japanese government under the FSIA.

b. Removal was proper. EIEG asserted claims against the RCC. As the district court found, the RCC did not voluntarily interject itself into an action that otherwise would not be binding on it. As the Bank's transferee, the RCC would be bound by the judgment in the action regardless of whether it is formally joined as a defendant. Fed. R. Civ. P. 25(c); Guam R. Civ. P. 25(c). Joinder therefore merely allowed the RCC to defend its interests in the action in its own name and to assert its rights, including the right to remove the action to federal court pursuant to 28 U.S.C. § 1441(d). Petition at App. 53a.

c. *Patrickson* has no bearing. The Ninth Circuit's opinion stated:

> We have held that, under the FSIA, a corporation owned by an agency or instrumentality of a foreign government is not itself an instrumentality of that government. *Gates*, 54 F.3d at 1462. The Supreme Court has recently granted certiorari on this question. *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *cert. granted in part*, 536 U.S. 956, 122 S. Ct. 2657, 153 L. Ed. 2d 834 (2002). . . . The pendency of *Patrickson* in the Supreme Court does not affect our decision here, however, because ***we rest our decision on a separate ground.***

322 F.3d at 639 n.3 (emphasis added).

Later, in connection with EIEG's petition for rehearing before the Ninth Circuit, the parties briefed whether the *Patrickson* opinion applied. EIEG was fully heard on this issue. The Ninth Circuit allowed EIEG to file a 10 page reply (filed April 28, 2003), discussing *Patrickson*. Thereafter, on May 29, 2003, the Ninth Circuit denied EIEG's petition for rehearing.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE IS STILL INTERLOCUTORY

This case is not appropriate for certiorari because it is interlocutory. The Ninth Circuit appeals arose from the district court's orders reforming a Term Sheet for Settlement, including giving EIEG six additional months to pay the RCC $55 million, and ordering a return to trial if EIEG did not perform by the reformed deadline. The Ninth Circuit affirmed the district court's exercise of jurisdiction, reversed the district court orders regarding the Term Sheet, and remanded the action to district court for trial. Thus, although this case has been in litigation for a long time, in fact, the parties are at the beginning: awaiting trial. This petition is interlocutory, like EIEG's prior petition for certiorari. *See supra* note 3.

There is no warrant for this Court to intervene now in this lawsuit. Normally, this Court will not issue a writ of certiorari until there is a final decree. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Lack of finality in the judgment below is a sufficient basis to deny certiorari. *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328

(1967) (denying certiorari "because the Court of Appeals remanded the case, [and thus] it is not yet ripe for review by this Court"). Indeed, interlocutory orders denying motions to remand are not ordinarily reviewed by either the Courts of Appeals or the Supreme Court until there is a final judgment. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996).

II. NO CIRCUIT CONFLICT EXISTS

Certiorari should be denied because EIEG fails to identify any genuine circuit conflict. None exists.

1. The plain language of 28 U.S.C. § 1603(b)(2) sets forth two independent means by which any entity which is a separate legal person, corporate or otherwise, can be an agency or instrumentality of a foreign state. "[T]he entity must *either* be an 'organ of a foreign state' ***or*** have a majority of its shares owned by 'a foreign state or political subdivision thereof.'" *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461 (9th Cir. 1995) (emphasis added). Under Section 1603(b)(2), if an entity is "an organ of a foreign state," it is irrelevant whether a majority of its shares are directly owned by the foreign state or whether, as with the RCC in this case, it is a wholly-owned subsidiary of an agency or instrumentality of a foreign state. *Id.*, *see also* H.R. Rep. 94-1487 at 15-16 ("entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a government procurement agency or a department or ministry which acts and is suable in its own name."). There is no conflict among the circuits on this issue.

a. Every Ninth Circuit opinion that has addressed the issue has agreed that the "organ" test and "ownership" test are two independent ways for an entity to qualify as an "agency or instrumentality" of a foreign state under Section 1603(b)(2). *See, e.g., Patrickson v. Dole Food Co.*, 251 F.3d 795, 807-08 (9th Cir. 2001), *aff'd,* 538 U.S. ____, 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003) (recognizing that a corporation which is not directly owned by a foreign sovereign may be an organ of a foreign sovereign); *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (even though a majority of a corporation's shares are not directly held by a foreign sovereign, "it is still possible for it to be an 'organ' of a foreign state as defined by § 1603(b)(2)."); *Corporacion Mexicana de Servicios Maritimos, SA de C.V. v. M/T Respect*, 89 F.3d 650, 654 (9th Cir. 1996) ("there are two ways in which an entity can fulfill the requirements of § 1603(b)(2).").

b. The other circuits and their district courts uniformly conclude that an entity need only satisfy ***either*** the "organ" test ***or*** the "ownership" test, not both. *E.g., USX Corp. v. Adriatic Ins. Co.*, 2003 U.S. App. LEXIS 19779 (3d Cir. Sept. 25, 2003) (Post-*Patrickson* decision holding that a corporation satisfied the "organ" test, but not the "ownership" test); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846 (5th Cir. 2000) ("because we conclude that Al Furat is an organ of a foreign state, we need *not* consider § 1603(b)(2)'s ownership requirements"); *Dewhurst v. Telenor Invest A.S.*, 83 F. Supp. 2d 577, 594 (D. Md. 2000) ("Subsection 1603(b)(2) is written in the disjunctive. . . . If the subsidiary is 'an organ of a foreign state or political subdivision thereof,' it can receive the protections of the FSIA, regardless of the owner of the subsidiary's shares."); *Proctor & Gamble Cellulose Co. v.*

Viskoza-Loznica, 33 F. Supp. 2d 644, 654 (W.D. Tenn. 1998) (evaluating both "ownership" and "organ" tests).

c. No court has ever held that a separate legal person, corporate or otherwise, which is an "organ of a foreign state" within the meaning of the FSIA, must also have a majority of its shares or other ownership interest directly owned by the foreign state to be an "agency or instrumentality of a foreign state." No court could so hold. It is contrary to the plain language of 28 U.S.C. § 1603(b)(2).

d. Before addressing the "organ" prong, this Court should wait to see whether a post-*Patrickson* circuit conflict on the "organ" prong ever materializes. There is none now.

2. On the second question, certiorari is also unnecessary. No circuit conflict exists regarding whether a foreign sovereign may remove an action when it is joined as a defendant pursuant to stipulation and order. This issue is extremely rare. The Ninth Circuit's decision is the first to address the issue since the FSIA was passed in 1976. No other circuit "has answered this precise question." 322 F.3d at 645 n.7.

III. THE NINTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

The Supreme Court has not addressed either of the two issues presented in the petition. No conflict with this Court's decisions thus could exist.

1. On the first issue, this Court has never addressed the "organ" test in Section 1603(b)(2). Accordingly, the

Ninth Circuit's decision does not conflict with any decision of this Court.

a. The Ninth Circuit held "there are two ways in which an entity can fulfill the requirements of [28 U.S.C. § 1603(b)(2)]. *Either* the entity can be an 'organ of a foreign state,' *or* the entity can have a majority of its shares . . . owned by 'a foreign state or a political subdivision thereof.'" 322 F.3d at 639 (emphasis in original).

b. EIEG's petition rises and falls on its interpretation of *Patrickson*, a case that did not involve or address the "organ" test. *Patrickson* addressed ***only*** the "ownership" test in 28 U.S.C. § 1603(b)(2) and did not consider the separate "organ" test in that section:

> [The Dead Seas Companies] cannot come within the statutory language which grants status as an instrumentality of a foreign state to an entity a 'majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.' § 1603(b)(2). We hold that only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement.

123 S. Ct. at 1660.

c. EIEG cites *Patrickson* for the proposition that a corporate entity can only qualify as an agency or instrumentality of a foreign state if a majority of its shares are directly owned by a foreign state. But *Patrickson* did not so hold. Nowhere in *Patrickson* did this Court suggest that a corporation which satisfied the "organ" prong within the meaning of the FSIA could not be an agency or instrumentality unless it also satisfied the separate "ownership" prong at issue in *Patrickson*. Indicative of the fact that

Patrickson was not considering the "organ" test in Section 1603(b)(3), the word "organ" appears only once in the entire opinion – in a quotation of the statutory language.

d. The briefs in *Patrickson* establish that the "organ" prong was a separate test and not at issue in *Patrickson.* In *Patrickson,* the Solicitor General set forth the United States' position:

> [A] determination that a foreign state does not own a majority of the shares of a corporate entity does not exclude the possibility that the corporation may nevertheless qualify as an 'organ' of a foreign state.

Brief of the United States, at 12 n.5 (May 31, 2002). The United States reiterated this position in its brief on the merits. "Section 1603(b) similarly confers 'agency or instrumentality' status on corporations engaged in sovereign acts through its provision extending that status to an 'organ of a foreign state.' 28 U.S.C. 1603(b)(2). *In addition*, Section 1603(b) confers that status – and the accompanying procedural protections – on corporations the majority of whose shares are actually owned by a foreign state, *whether or not* those corporations perform sovereign functions. *Ibid.*" 2002 WL 31261045 (Appellate Brief) Brief for the United States As Amicus Curiae Supporting Respondents (October 3, 2002), at 19.

e. Other briefs in *Patrickson* stressed that the "organ" test was not before the Court:

• "There is a separate test that does look to the governmental purpose of the entity in question, the 'organ'

test of § 1603(b)(2), but that test is not at issue in *Patrickson*."[7]

- "If a foreign entity (whether corporate or not) is genuinely involved in sovereign activities, it can seek to satisfy a separate test for FSIA immunity, known as the 'organ' test. Here, the lower courts held that the Dead Sea Companies did not meet that test, and petitioners do not seek review of the question."[8]

In sum, *Patrickson* did not consider the "organ" prong of Section 1603(b)(2) on which the Ninth Circuit relied. The Ninth Circuit's decision here does not conflict with *Patrickson*.

f. EIEG argues, erroneously, that Congress did not intend to include corporations as "organs of a foreign state." Referencing various secondary authorities, EIEG asserts that at the time Congress enacted the FSIA the general understanding within the international law framework was that the term "organ" did not include corporations. No case has so held. The secondary authorities cited by EIEG establish exactly the opposite.

- "The immunity of a foreign state . . . extends to . . . a corporation created under its laws and exercising functions comparable to those of an agency of the state." "A corporation performing a governmental function is possibly entitled to immunity even though the government

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[7] 2002 WL 1987396 (Appellate Brief) Brief Amicus Curiae of the Republic of Ireland and Icarom PLC (Under Administration) in Support of Petitioners (August 23, 2002) at *23, n.13.

[8] 2002 WL 31261029 (Appellate Brief) Brief of Respondents (October 3, 2002) at *10.

owns only a portion of its stock." *Restatement (Second) of Foreign Relations Law of the United States § 66(g) and cmt. c and Reporters' Note 2(b)* (1965).

- The "decisive criterion" for determining whether public corporations are organs of the State "should be the nature of the functions performed. . . . "[9] *Third Report on State Responsibility,* U.N. Doc. A/CN. 4/246 & Add. 1-3, *reprinted in* [1971] 2 Y.B. Int'l. L. Comm'n (pt. 1) 199, U.N. Doc. A/CN.4/SER.A/1971 at 256.

- "The terms 'organ' and 'agency' are intended to comprehend all the organs and agencies, in the broadest sense, through which a State may act." *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, Art. 16.1, *reprinted in* F.V. García-Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* 250 (1974).

- Other countries extend sovereign immunity to corporations ***not*** on the basis of ownership but instead on the basis of whether the corporation engages "in the exercise of sovereign authority." Gary B. Born & David Westin, *International Civil Litigation in United States Courts*, 459 (2d ed. 1992).

- Under the separate entity rule, corporations that perform sovereign functions are entitled to sovereign

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[9] "[I]t would be absurd to conclude, on the basis of this distribution [of public functions between the State itself and other public institutions or corporations] that an act or omission in the performance of one and the same public function should, from the international standpoint, be considered as an act of the State in one case and not in another." *Id.* at 256.

immunity. William C. Hoffman, *The Separate Entity Rule in International Perspective*, 65 Tul. L. Rev. 535, 542-43 and 546 (1991).[10]

The international law framework establishes that the term "organ" includes corporations that performed sovereign functions, without regard to their owners.

g. EIEG does not seek review of either the Ninth Circuit's decision that the RCC is an organ of the Japanese government, or the test employed by the Ninth Circuit to evaluate whether an entity is an organ. Despite this, EIEG devotes pages of its petition to calling the "organ" test "complex," a "tortuous multi-factor balancing inquiry," "unworkable," and "convoluted." Petition at 7, 9, 15 and 20-23. It is not. The Ninth Circuit and district court had no difficulty in evaluating various relevant factors, considering substantial evidence, and concluding that the RCC is a government organ.[11] Moreover, the secondary authorities upon which EIEG relies support the use of the "multi-factor" inquiry employed by the Ninth Circuit. Gabe Shawn Varges, *Defining a Sovereign for Immunity*

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[10] This secondary authority cites the pre-FSIA case of *Dunlap v. Banco Central del Ecuador*, 41 N.Y.S.2d 650 (N.Y. Sup. Ct. 1943). *Id.* at 542, n.41. In that case, the court denied a motion to dismiss the sovereign immunity defense asserted by the defendant, which was a corporation 45% owned by Ecuador because "it may have acted solely as a part of the Republic of Ecuador, and as its instrumentality in the performance of its governmental function of minting and circulating its fractional money." *Id.* at 652.

[11] EIEG's suggestion that appellate courts will likely reach different conclusions than the district courts in evaluating the relevant factors (Petition at 15) is not supported by the appellate experience. This Court need not grant review now because of EIEG's prediction of as-yet-nonexistent trial court confusion.

Purposes, 26 Harv. Int'l L. J. at 154 (1985); *Restatement (Second) of Foreign Relations § 66* (1965) Reporters' Notes.

2. On the second question presented by EIEG's petition for certiorari, the Ninth Circuit's decision is correct and does not conflict with any decision by this Court. The broad language of 28 U.S.C. § 1441(d) authorizes removal of "*any* civil action brought in a State court against a foreign state." (Emphasis added). This statutory language is unambiguous and contains no indication of any limit on the right to removal when the foreign sovereign is joined as a defendant pursuant to stipulation and court order. Allowing foreign states to remove actions when they are joined as defendants is consistent with Congress' unusually strong preference "that actions involving foreign states be tried in federal courts," H.R. Rep. No. 94-1487, at 32, and the fact that "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts." *Verlinden*, 461 U.S. at 497. Limiting a foreign sovereign's right to remove when joined as a defendant pursuant to stipulation and court order would rewrite the statutory language.

a. "The right to remove a case from a state to a federal court is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3721 (1998); *Tenn. v. Davis*, 100 U.S. 257, 263-64 (1879); *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 349 (1816) ("The time, the process, and the manner [of removal], must be subject to [Congress'] absolute legislative control.");

Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) ("the right of removal is entirely a creature of statute").

b. The "starting point for interpreting a statute is the language of the statute itself." *Hallstrom v. Tillamook County,* 493 U.S. 20, 25 (1989). Congress explicitly drafted the FSIA removal action very broadly. It applies to "any civil action brought in a State court against a foreign state." 28 U.S.C. § 1441(d). As the Ninth Circuit held:

> On its face, §1441(d) contains no restrictions on a foreign sovereign's right to remove. . . . Under a straightforward reading of §1441(d), then, a later-joined foreign sovereign assignee apparently enjoys the same right of removal as a foreign sovereign that is an original defendant in a suit filed in state court.

332 F.3d at 644. When EIEG stipulated to the joinder of the RCC as a defendant, and the Guam Superior Court ordered its joinder, this lawsuit became a "civil action brought in a State court against a foreign state." 28 U.S.C. § 1441(d).[12]

c. This Court has never held that the FSIA precludes a foreign state from removing an action when it joins an action as a defendant pursuant to stipulation. In

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[12] The statute does not require that the foreign state be named as a defendant when a plaintiff originally files its complaint. Circuits have uniformly held that foreign sovereigns may remove actions when they are named as third-party defendants subsequent to the filing of the original complaint. *Davis v. McCourt,* 226 F.3d 506, 509 (6th Cir. 2000); *In re Air Crash Disaster Near Roselawn,* 96 F.3d 932, 942 (7th Cir. 1996); *In re Surinam Airways Holding Co.,* 974 F.2d 1255, 1259 (11th Cir. 1992); *Nolan v. Boeing Co.,* 919 F.2d 1058, 1064-65 (5th Cir. 1990).

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489-90 (1983), this Court instructed that no limitations on the right of a foreign state to be in federal court should be implied in the FSIA. Specifically, this Court indicated that limits on diversity jurisdiction should not be engrafted into the FSIA. Despite the fact that diversity jurisdiction does not exist over actions by foreign plaintiffs against foreign defendants, the language of FSIA provides for subject matter jurisdiction over any "civil action against a foreign state. . . . " 28 U.S.C. § 1330(a). This Court held the FSIA "contains no indication of any limitation based on the citizenship of the plaintiff." *Id.* at 490. Accordingly, this Court held: "[i]f an action satisfies the substantive standards of the Act, it may be brought in federal court regardless of the citizenship of the plaintiff." *Id.* at 490. *Verlinden* teaches that limitations should not be read into the FSIA based on rules applicable to diversity jurisdiction, when the FSIA's statutory language "contains no indication of any limitation." *Id.* at 490.

d. Contrary to EIEG's petition, the Ninth Circuit's decision is not "irreconcilable with *Patrickson*." *Patrickson* is legally and factually distinct. In *Patrickson*, defendants impleaded the putative instrumentality of a foreign state subsequent to the original filing of the complaint. At that time, the foreign sovereign had severed its relationship with the impleaded defendant. In these circumstances, *Patrickson* held that agency or instrumentality status must be determined at the time suit is filed, not at the prior date of alleged wrongdoing. 123 S. Ct. at 1662-63. In so ruling, *Patrickson* relied on the use of the present tense in Section 1603(b) and merely noted, as an aside, that its interpretation of the statutory language in the FSIA was consistent with the rule in diversity cases

that diversity jurisdiction depends on citizenship of the parties at the time suit is filed. 123 S. Ct. at 1662. *Patrickson* did not state that jurisdictional limitations based on diversity rules should be implied wholesale into the FSIA or purport to overrule *Verlinden*.[13]

e. EIEG relies on two diversity cases from the mid-1880s, *Cable v. Ellis*, 110 U.S. 389 (1884) and *Jefferson v. Driver*, 117 U.S. 272 (1886), to argue that a party that "joins a pending state court action cannot remove the case to federal court unless the case could have been removed in that party's absence." Petition at 24. EIEG's argument is divorced from any analysis of the FSIA's broad statutory language authorizing removal of "any civil action brought in State court against a foreign state" and fails to recognize that *Cable* and *Jefferson* pre-date the FSIA.

f. EIEG asserts that "[t]he Ninth Circuit refused to follow *Cable* and *Jefferson* because they are old." Petition at 25. Not so. Rather, the Ninth Circuit correctly noted that "[t]hese cases were decided almost one hundred years ***before*** the enactment of the FSIA and the concomitant creation of removal rights in foreign states. Thus, these cases cannot and do not speak directly to the

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[13] When a foreign sovereign is joined as a defendant subsequent to the filing of the original complaint, the suit becomes a "civil action brought in State court against a foreign state" as of the date of joinder. *Cf., Davis*, 226 F.3d at 509; *In re Air Crash Disaster*, 96 F.3d at 942; *In re Surinam Airways*, 974 F.2d at 1259; *Nolan*, 919 F.2d at 1064-65. The use of the present tense in 28 U.S.C. § 1603(b)(2) and *Patrickson* indicate that in such a case the instrumentality status of the entity must be determined as of the date of joinder, not as of some earlier date when the entity was not a defendant.

question of what Congress intended the FSIA rule to be." 322 F.3d at 646-47 (emphasis added). Neither *Cable* nor *Jefferson* purported to interpret the FSIA's removal provisions or limit Congress' ability to authorize removal.

g. The FSIA's legislative history also supports the Ninth Circuit's refusal to apply *Cable* and *Jefferson* to FSIA removal. The FSIA establishes comprehensive statutory standards for actions against foreign sovereigns. H.R. Rep. No. 94-1487, at 12. The FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." *Id.* The FSIA "preempt[s] any other State or Federal Law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." *Id.* To engraft limitations on diversity removal into FSIA removal, as EIEG suggests, would be directly contrary to the statute.

h. Applying *Cable* and *Jefferson* to FSIA removal would also be contrary to "Congress' unusually strong preference for adjudication of claims against foreign states in the federal court system." *In re Texas E. Transmission Corp.*, 15 F.3d 1230, 1243 (3rd Cir. 1994); H.R. Rep. No. 94-1487, at 32 ("In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in State courts."). This Court recognized this unusually strong preference: "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a

multiplicity of conflicting results among the courts of the 50 States." *Verlinden*, 461 U.S. at 497.[14] Nothing in the FSIA suggests that Congress was less concerned about actions against foreign sovereigns when they were joined as defendants pursuant to stipulation and order.

i. The Congressional policies underlying the broad statutory language in the FSIA providing for removal of "any civil action . . . against a foreign state" apply equally when claims are asserted against a foreign state as the result of its joinder in an action pursuant to stipulation. The Ninth Circuit correctly recognized this: "Logically, Congress' twin concerns – the potential political sensitivity of actions against foreign states and the importance of developing a uniform body of federal law in this area – apply equally to a foreign state that is a 'voluntary' defendant and to a foreign state that is an 'involuntary' defendant. If the foreign sovereign's interests are at play, the 'voluntary' nature of the sovereign's participation does nothing to diminish Congress' concerns about the need for sensitivity to foreign states and the need for uniformity of law in this area." 322 F.3d at 646.

j. EIEG argues that FSIA must be read in light of the "general rules" governing removal and that to the extent Congress intended the FSIA to deviate from the

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[14] EIEG incorrectly argues that "the FSIA is inapplicable" "[w]hen foreign states are plaintiffs." Petition at 28. In fact, the FSIA added diversity jurisdiction for foreign sovereign plaintiffs. 28 U.S.C. § 1332(a)(4). This section reflects that foreign sovereigns are entitled to special access to a federal forum, even when they voluntarily participate in litigation in the United States. H.R. Rep. No. 94-1487, at 14 ("to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff").

general rules governing removal, it expressly codified those deviations. Petition at 27. Again, not true. For example, unlike diversity where there is an amount-in-controversy threshold (now $75,000), there is no such amount-in-controversy requirement in the FSIA. As another example, the general rule is that all defendants must join in removal, and that a case is not removable if one of the defendants is a resident of the forum state. In FSIA cases, however, "[n]ew subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought." H.R. Rep. No. 94-1487, at 32. Contrary to EIEG's argument, the language of Section 1441(d) does ***not*** "codif[y] those deviations from the general rules in the text of the statute." *Cf.* Petition at 27.

k. The Ninth Circuit correctly recognized that the broad removal provision in Section 1441(d) should be construed in a way consistent with the removal statutes for the Resolution Trust Corporation (RTC) and Federal Deposit Insurance Corporation (FDIC), two U.S. government instrumentalities analogous to the RCC. 322 F.3d at 648-49. Congress has authorized the RTC and FDIC to remove "any action, suit or proceeding" to which these entities become parties. 12 U.S.C. §§ 1441a(l)(3)(A) and 1819(b)(2)(B). The circuits have uniformly held that the RTC and FDIC may remove "any action" to federal court, without any discussion in the cases as to whether the RTC or FDIC's joinder was voluntary or involuntary. *E.g.*, *RTC v. BVS Dev., Inc.*, 42 F.3d 1206, 1211-12 (9th Cir. 1994); *FDIC v. Keating*, 12 F.3d 314 (1st Cir. 1993); *RTC v. Nernberg*, 3 F.3d 62 (3d Cir. 1993); *In re 5300 Mem'l*

Investors, Ltd., 973 F.2d 1160, 1162 (5th Cir. 1992); *In re Meyerland Co.*, 960 F.2d 512 (5th Cir. 1992). Just as *Cable* and *Jefferson* do not limit the RTC's and FDIC's right to remove "any action" when it voluntarily substitutes in an action, they likewise do not limit a foreign sovereign's right to remove "[a]ny civil action brought in a state court against a foreign state," without regard to whether the foreign sovereign becomes a defendant pursuant to stipulation.[15]

Given the similar statutory language authorizing removal, there is nothing extraordinary about the RCC being able to remove actions in circumstances similar to those under which the RTC or FDIC can remove actions – *i.e.*, when RCC becomes a defendant to an action after acquiring assets from a failed financial institution as part of government efforts to revitalize a country's financial system.

1. Removal by foreign sovereigns who join actions poses no serious threat of mischief as EIEG asserts. EIEG speculates that the Ninth Circuit's decision will cause forum shopping and manipulation of federal jurisdiction by private parties acting in collusion with foreign sovereigns. Petition at 29-30. The dearth of cases involving removal by foreign sovereigns joined as defendants pursuant to stipulation belies EIEG's speculation. In fact, EIEG never asserted below that the RCC, an agency

[15] EIEG misconstrues *Matthews v. CTI Container Transport International Inc.*, 871 F.2d 270, 281 (2d Cir. 1989), as holding that a foreign sovereign which voluntarily participates in litigation has no FSIA protections. Petition at 29. The Second Circuit, however, emphasized in *Matthews* that the FSIA's protections, including the right to a non-jury trial, still applied. 871 F.2d at 281 n.6.

and instrumentality of Japan, was collusively joined or manipulated federal jurisdictional facts. In any event, Congress has already addressed the possibility of the manipulation of jurisdiction facts. 28 U.S.C. Section 1359 provides that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." Section 1359 is designed "to prevent the manipulation of jurisdictional facts" by parties "who by sham, pretense, or other fiction acquire a spurious status that would allow them to invoke the limited jurisdiction of the federal courts." *Nolan v. Boeing Co.*, 919 F.2d 1058, 1067 (5th Cir. 1990). This statute addresses EIEG's concerns. There is no need to create a judicial limitation on the right of foreign sovereign defendants to remove pursuant to 28 U.S.C. Section 1441(d).

IV. THERE IS NO REASON TO GRANT, VACATE, AND REMAND

EIEG asks for a grant, vacate, and remand order. None is necessary, because EIEG already argued to the Ninth Circuit its views about the applicability of *Patrickson*. Although the Ninth Circuit issued its decision before *Patrickson*, the Ninth Circuit correctly recognized what was (the "ownership" prong) and what was not (the "organ" prong) at issue in *Patrickson*: "The pendency of *Patrickson* in the Supreme Court does not affect our decision here, however, because we rest our decision on a separate ground [*i.e.*, the 'organ' prong]." 322 F.3d at 639 n.3.

Then, in connection with EIEG's petition for rehearing, both EIEG and the RCC/Bank substantially briefed

Patrickson in pleadings filed in April 2003. EIEG acknowledges that the Ninth Circuit was aware of this Court's decision in *Patrickson* before denying EIEG's rehearing petition. Petition at 8, 10. The Ninth Circuit denied EIEG's petition for rehearing on May 29, 2003, after allowing EIEG to file a detailed reply in support of the petition for rehearing which addressed the decision.

Because it is clear that the Ninth Circuit considered this Court's decision in *Patrickson* and found it inapplicable to the "organ" prong of Section 1603(b)(2), an order granting certiorari, vacating, and remanding would not be appropriate. *Cf. Lawrence v. Chater*, 516 U.S. 163, 173 (1996) (The Court's power to issue order granting certiorari, vacating, and remanding "should be exercised sparingly").

V. CONCLUSION

For the reasons set forth above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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In The
Supreme Court of the United States

EIE GUAM CORPORATION,

Petitioner

v.

THE LONG-TERM CREDIT BANK OF JAPAN, LTD., and THE RESOLUTION AND COLLECTION CORPORATION

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR PETITIONER

The petition for a writ of *certiorari* demonstrates that review is warranted in this case because the Ninth Circuit's ruling conflicts with the decision of this Court in *Dole Food Co. v. Patrickson*, 538 U.S. ___, 123 S. Ct. 1655 (2003), permits evasion of that decision, expands unduly federal court jurisdiction, and is also contrary to longstanding precedent of this Court concerning removal by voluntarily joined parties. Respondents contend that *certiorari* should not be granted, however, by pointing to the procedural posture of the case and attempting to disavow the conflict with *Patrickson* and other precedent. But none of respondents' arguments undermine the need for the Court's review in this case.

A. The Interlocutory Nature Of The Case Does Not Weigh Against Immediate Review Where, As Here, Later Review Is Likely Not Available

Respondents' contention (Br. in Opp. 11-12) that the Court should deny review in this case because of the interlocutory posture of the proceeding is misplaced. Later review by this Court or an appellate court following entry of a final judgment is likely not available with regard to the questions presented here concerning the erroneous rulings below refusing to remand the case to local court. The situation presented by this case is contrary to the normal rule that an appeal from a final judgment permits this Court to review all prior court of appeals' opinions preceding the judgment. Rather, this case is governed by *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), which respondents cite (Br. in Opp. 12), but misconstrue.

Caterpillar held that a party, in an appeal from a district court's final judgment after trial, could not challenge the district court's earlier order that had denied remand to a state court. The Court acknowledged that the refusal to remand had been error, but nonetheless refused to reverse. The Court explained that, because the case already had proceeded through trial in federal court and because the district court had subject-matter jurisdiction over the parties by the time of final judgment, it would

constitute an undue waste of judicial resources to vacate the district court's erroneous pretrial refusal to remand. *Id.* at 75-77. Under *Caterpillar*, the instant petition for a writ of *certiorari* is likely the only opportunity that petitioner has for review by this Court of the district court's order that refused to remand the case to local court because a nondiverse party is no longer in the case at this point in time. The refusal to remand order is properly reviewed now because there would be no undue waste of judicial resources if it were corrected pretrial and the issue was properly reviewed as part of an appeal taken under 28 U.S.C. § 1292(a)(1) from certain injunctions, Pet. App. 4a-5a, 30a-31a. *Cf. Patrickson*, 123 S. Ct. at 1659 (reviewing court of appeals' judgment that had reversed district court order refusing to remand suit to state court, where appeal was from pretrial dismissal on other grounds).

Even if further review of the questions presented were possible at some later date, petitioner will suffer irreparable injury now if it is forced to litigate the merits of this case in the district court when the case legally belongs in local Guam court. Moreover, respondents do not dispute that one of the consequences of the refusal to remand the case is the loss of petitioner's right to a jury trial on some of its claims at law. The loss of such a right warrants this Court's immediate review. *See Ex parte Simons*, 247 U.S. 231, 239 (1918) (Holmes, J.) (an order that "deprived the plaintiff of her right to a trial by jury" should be dealt with by the Court "before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by [a trial] that ultimately must be held to have been required under a mistake").[1] Even in less compelling circumstances, the Court routinely grants review in cases such as this one in which a

[1] Contrary to respondents' suggestion (Br. in Opp. 3 n.3, 11), petitioner's earlier petition for a writ of *certiorari* does not somehow weigh against granting review here. That petition was filed before respondent Resolution and Collection Corporation (RC Corporation) joined and removed the case and involved issues unrelated to the district court's subsequent refusal to remand.

court of appeals has remanded a case to a district court for trial. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. ___, 123 S. Ct. 1673 (2003).

B. The Ninth Circuit's Multi-Factor Analysis Is Inconsistent With *Patrickson* And Conflicts With Decisions Of Other Circuits

1. Respondents err in arguing that, because *Patrickson* did not decide the precise question presented here, no conflict with that decision "thus could exist." Br. in Opp. 14, 17. The decision below conflicts with this Court's decision because it is inconsistent with *Patrickson*'s rationale and that underlying rationale binds lower courts and governs future cases. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). That is particularly so here because *Patrickson* deals with the proper interpretation of the same statutory definition of "agency or instrumentality of a foreign state" in the Foreign Sovereign Immunities Act of 1976 (FSIA) that is at issue in this case – 28 U.S.C. § 1603(b). Thus, it is clear that this case warrants review because the Ninth Circuit has "decided an important federal question [under the FSIA] in a way that conflicts with [a] relevant decision[ ] of this Court." Sup. Ct. R. 10(c).

The Ninth Circuit's FSIA ruling also fosters uncertainty regarding "an important question of federal law" that concerns international commerce and "that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). *Patrickson* was informed by the need for predictability regarding agency or instrumentality status under the FSIA. The United States made clear, in a brief as *amicus curiae* at the merits stage in *Patrickson*, the importance of predictability in interpreting the language of Section 1603(b), urging the adoption of "clear and manageable rules that rest on familiar corporate law concepts." Br. for U.S. as *Amicus Curiae* Supp. Resp. 20, *Dole Food Co. v. Patrickson* (Oct. 2002). The brief emphasized that "[i]ndividuals who do business with foreign corporations

need such rules when determining whether they are dealing with entities that may be subject to the FSIA." *Ibid.* Indeed, in its earlier brief filed on petition for *certiorari* at the invitation of the Court, the United States had urged the Court to grant *certiorari* on the second question in *Patrickson*, even though that issue had "not generated a conflict among the courts of appeals," because it presented "an important issue under the FSIA in its own right," and the lower courts had not resolved the issue correctly. Br. for U.S. Supp. Pet. for Cert. 16, *Dole Food Co. v. Patrickson* (May 2002).

2. The decision below improperly expands federal court jurisdiction and sovereign immunity under the FSIA to a new category of defendants – foreign corporations that are owned by someone other than foreign states. The court of appeals concluded that a private corporation, *i.e.*, respondent Resolution and Collection Corporation (RC Corporation), qualified as an "agency or instrumentality" under the FSIA even though it failed the requirement of majority ownership of "shares" to establish such status. 28 U.S.C. § 1603(b)(2). The court relied, instead, on a multi-factor balancing analysis to hold that RC Corporation constituted an "organ of a foreign state" and thus established agency or instrumentality status. *Ibid.* That ruling is contrary to the rationale in *Patrickson* regarding the intent of Congress in the FSIA to respect corporate form. It conflicts as well with *Patrickson*'s rationale regarding the proper interpretation of the text and structure of Section 1603(b)(2) of the FSIA in light of the intent to promote certainty and predictability in matters involving foreign actors and sovereigns.

First, *Patrickson* repeatedly emphasized that the text and structure of the FSIA demonstrated that Congress intended to respect corporate form when enacting the FSIA. *See* 123 S. Ct. at 1660, 1661. Respondents have offered no possible reason why Congress would have intended background principles of corporate structure to govern the interpretation of the second phrase in Section 1603(b)(2), but not the first phrase in Section 1603(b)(2). There is no reason to think that Congress, relying on corporate structure and formalities – a reliance critical to the *Patrickson* holding – would have intended a corporation that did not meet the

relevant corporate standard to rely on a category designed for noncorporate entities. *Cf.* 123 S. Ct. at 1662 (rejecting a "control test" and affirming the "better rule," supported by "the statutory text and elementary principles of corporate law," that "[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares").

Second, *Patrickson* rejected the statutory interpretation argument that respondents here press most vigorously – that by using the "disjunctive 'or' " in Section 1603(b)(2), Congress intended to allow an entity to qualify as an "agency or instrumentality" if it met any of the conditions articulated in that subsection. Br. in Opp. i, 2, 12-14, 15-16. *Patrickson* refused to divorce the statutory text from the statutory structure in that manner when it interpreted Congress's use of the word "or" elsewhere in Section 1603(b)(2).

The FSIA provides that an "agency or instrumentality" means any "entity" "which is an organ of a foreign state or political subdivision thereof, *or* a majority of whose shares *or* other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b) (emphases added). The defendant corporations in *Patrickson* (which were subsidiaries of a foreign state's instrumentality) argued, based on the second "or" emphasized above, that, even if the foreign state did not own the majority of their shares, they could still qualify as agencies or instrumentalities of the foreign state because the foreign state owned a majority of "other ownership interest" in them due to the state's "'interest' in its instrumentality's subsidiary." 123 S. Ct. at 1661. This Court rejected that argument. And, just as *Patrickson* thereby correctly refused to read the second "or" emphasized above in Section 1603(b)(2) to allow a corporation whose shares are not majority owned by a foreign state to rely on alternative means to establish agency or instrumentality status, the first "or" emphasized above in Section 1603(b)(2) cannot be read to allow a corporation that is not majority owned by a foreign state to rely on alternative means (*i.e.*, being deemed an organ) to establish agency or instrumentality status.

Third, in *Patrickson*, the Court looked to the "settled" and "formal" understanding of the terms "shares" and "owned" to determine their meaning. *Id.* at 1660. The Ninth Circuit here departed from the settled international understanding of the term "organ" at the time Congress enacted the FSIA, which generally excluded corporations, particularly corporations not owned by a foreign state. *See* Pet. 16-17. Respondents note (Br. in Opp. 17-19) that the relevant sources identify areas where international practice sometimes grants corporations immunity even when not majority-owned by a foreign sovereign. Petitioner does not dispute that proposition, but those authorities do not use the term "organ" to describe such entities. To the contrary, in the authoritative international documents to which Congress and the State Department would have turned in the 1970s when the FSIA was enacted, corporations are described as "enterprises" or "institutions," not "organs" of nation states. *See* Pet. 16-17.

3. The unpredictable nature of the Ninth Circuit's multi-factor "organ" test for a corporation that is not majority owned by a foreign state is dramatically demonstrated by the erroneous conclusion that the RC Corporation met the test in this case, as well as by the disarray that the test has created among the courts of appeals. Respondents attempt to discount the significance of the conflicting multi-factor tests applied by the various courts of appeals by claiming (Br. in Opp. 10, 19) that petitioner does not seek review of the erroneous determination of RC Corporation as an organ of a foreign state or of the test applied by the Ninth Circuit to determine organ status. But, of course, petitioner seeks review of both issues directly through the first question presented. That question, if correctly answered in the negative, requires reversal of the court of appeals' designation of RC Corporation as an agency or instrumentality of a foreign state for two reasons. First, because, as a corporation, it cannot rely on "organ" status to nonetheless qualify as an agency or instrumentality. And second, because the court of appeals was wrong to apply any test, let alone an unpredictable multi-factor balancing test, to make such a determination.

Petitioner does not seek review by the Court as to which of the conflicting court of appeals multi-factor tests is correct because none of them is. But that does not eliminate the fact that the Ninth Circuit "entered a decision in conflict with the decision" of the Fifth Circuit "on the same important matter" by applying a different multi-factor balancing analysis, such that review by this Court is warranted in this case. Sup. Ct. R. 10(a). The Fifth Circuit, which applies a five-factor analysis, acknowledged that the Ninth Circuit's six-factor analysis has not provided a "clear test." *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir.), *cert. denied*, 531 U.S. 979 (2000). In a decision issued subsequent to the filing of the petition in this case, the Third Circuit further added to the confusion when it adopted a "flexible" seven-factor analysis that combined the factors developed by the Ninth Circuit and the "similar," but not identical, set of factors looked to by the Fifth Circuit, and then added another factor that focuses on the "ownership structure of the entity." *USX Corp. v. Adriatic Ins. Co.*, No. 00-3424, 2003 U.S. App. LEXIS 19779, at *39, *40, *48 (Sept. 25, 2003). Of course, the issue addressed by the Third Circuit's new factor is already addressed directly by Congress in the second phrase of Section 1603(b)(2).

Review should be granted to prevent evasion of *Patrickson* through such lower court analysis. Indeed, the Third Circuit itself has predicted that, in response to *Patrickson*, "courts likely now will be asked to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership or control foreign states may exert over entities." *Id.* at *44. Under each of the lower courts' varying "organ" tests for corporations, a court will have to inquire "in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares" – the very result rejected by the Court in *Patrickson*. 123 S. Ct. at 1662.

4. Respondents invoke three sentences from the United States' briefs in *Patrickson* to claim that those briefs "establish" that the "'organ' prong" in Section

1603(b)(2) is "a separate test and not at issue in *Patrickson*." Br. in Opp. 16. The briefs do not purport to set forth the United States' unequivocal view on the organ prong, although the selected sentences suggest a possibility that a corporation may be able to qualify as an organ merely by engaging in sovereign acts or functions (an inquiry notably inconsistent with the Ninth Circuit's test, and left unaddressed by respondents). Those sentences are not presented as part of any definitive governmental interpretation of the organ provision inasmuch as they are not supported by a full analysis of the statutory text, structure, or history pertinent to that provision. *Cf.* H.R. Rep. No. 94-1487, at 23, 25 (1976) (explaining that Congress modeled various provisions of the FSIA upon language from the European Convention on State Immunity); European Convention on State Immunity, May 24, 1972, Art. 27, 11 I.L.M. 470, 480 (granting sovereign immunity on the same terms as the state itself to a "legal entity" such as a corporation when it is acting in an "exercise of sovereign authority" – a provision not adopted by Congress in the FSIA).

Of course, a full examination of the question presented in this case was not submitted by the United States in *Patrickson* because, as respondents repeatedly emphasize, the precise question was not presented in that case. In light of *Patrickson*, clarification of the views of the United States on these matters may be of assistance to the Court.

C. The Ninth Circuit's Refusal To Comply With This Court's Longstanding Precedent Construing Federal Removal Statutes Also Warrants Review

Respondents attempt to evade the holding of *Cable v. Ellis*, 110 U.S. 389 (1884), and *Jefferson v. Driver*, 117 U.S. 272 (1886), through distinctions that are irrelevant or incorrect. They do not dispute that those cases hold that a party, like respondent RC Corporation, that voluntarily joins a state court action may not remove that action to federal court if the parties originally in the action could not do so. The Ninth Circuit agreed that, if this "background rule" were applied in this case, the RC Corporation

would not have been able to remove this action to federal court. Pet. App. 18a, 20a, 22a.

The Ninth Circuit cited the fact that *Cable* and *Jefferson* involved diversity jurisdiction as a reason not to rely on them, Pet. App. 22a, but the case law involving the federal removal statutes, codified next to the FSIA removal provision in Title 28 of the United States Code, is useful authority in cases involving FSIA removal. The general statute governing removal of cases involving diversity jurisdiction, 28 U.S.C. § 1441(a), certainly provides a better point of reference in cases under the FSIA involving foreign states than do the statutory removal provisions that use dissimilar language targeted at unique domestic federal entities, upon which respondents rely. *See* Br. in Opp. 26.

As interpreted in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the FSIA does not establish exclusive federal court jurisdiction for suits in which foreign states are participants. The FSIA requires foreign states that seek to be plaintiffs in federal court to meet the typical diversity or federal question requirements, *see* 28 U.S.C. §§ 1332(a)(4), 1331, and does not provide them any "special access" to a federal forum, as respondents claim (Br. in Opp. 25 n.14). Thus, *Verlinden* did not, contrary to respondents' assertion (Br. in Opp. 22, 23), declare that the diversity standards must be ignored in FSIA cases. In *Patrickson*, the Court relied on diversity cases in interpreting the FSIA's removal provision. *See* 123 S. Ct. at 1662.

Respondents' attempt to rely on the language of the FSIA to distinguish *Cable* and *Jefferson* is futile. The general removal statute, 28 U.S.C. § 1441(a), which is undisputedly governed by the rule of *Cable* and *Jefferson*, uses the same "*any* civil action brought in a State court" language of 28 U.S.C. § 1441(d) that is relied upon by respondents. Br. in Opp. 20, 21, 26-27. The Ninth Circuit itself concluded that "the text of the FSIA removal statute does not answer this question" regarding a voluntarily joined sovereign, Pet. App. 18a, and that a "plausible reading of the statute" (*id.* at 16a) would allow it to follow the rule of *Cable* and *Jefferson*.

Respondents suggest (Br. in Opp. 28) that the prohibition in 28 U.S.C. § 1359 against collusive joinder eliminates the need to rely in FSIA cases on *Cable* and *Jefferson*'s rule. Yet, that rule has co-existed with the prohibition in Section 1359, for more than one hundred years. Indeed, the rule is particularly apt in the FSIA context because it avoids the need for a court to determine whether the motive of an agency or instrumentality of a foreign state in accepting an assignment from a private corporation was "improper[ ] or collusive[ ]" under Section 1359, and eliminates extraordinarily intrusive discovery that could be required. It thus ensures the dignity of foreign states that the FSIA was intended to protect, *see Verlinden*, 461 U.S. at 489, while preserving litigation and judicial resources by avoiding forum-shopping.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition should be granted. In the alternative, the petition for a writ of *certiorari* should be granted, the judgment below vacated, and the case remanded for further consideration in light of this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. ___, 123 S. Ct. 1655 (2003).

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